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## TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

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No. 473

GUY T. HELVERING, COMMISSIONER OF INTERNAL  
REVENUE, PETITIONER

vs.

MARJORIE K. CAMPBELL

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR CERTIORARI FILED SEPTEMBER 28, 1940  
CERTIORARI GRANTED NOVEMBER 12, 1940

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1 Before United States Board of Tax Appeals

Docket No. 84639

MARJORIE K. CAMPBELL, PETITIONER

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*Docket entries*

Appearances: For Taxpayer.—Ralph M. Andrews, Esq., Dwight Taylor, Esq.; John L. Kenefick, Esq.; Ernest J. Brown, Esq. For Comm'r.—B. M. Brodsky, Esq.; W. H. Schwatka, Esq.; E. L. Updike, Esq.

1936

May 25—Petition received and filed. Taxpayer notified. (Fee paid)

May 25—Copy of petition served on General Counsel.

July 24—Answer filed by General Counsel.

July 31—Copy of answer served on taxpayer.

Sept. 3—Reply to answer filed by taxpayer. 9/4/36 copy served.

1937

July 20—Motion for circuit hearing at Buffalo, N. Y., filed by General Counsel.

July 23—Hearing set August 18, 1937, on motion.

2 Aug. 13—Hearing had before Mr. Mellot on motion of respondent to consolidate dockets 61658, 62811, 63186, 63245, 51, 64523, 64908, 10 to 15, 24, 65011, 24, 65202, 65393, 71815, 16, 77824, 27 & 28, 84639, 40, 41 & 42 and to deny his own motion for circuit hearing—granted. Motion filed at hearing.

Aug. 26—Hearing set Nov. 1, 1937.

Sept. 4—Motion for continuance until after Jan. 1, 1938 filed by taxpayer, 9/7/37 granted to Spring of 1938.

Sept. 4—Notice of the appearance of Dwight Taylor as counsel for taxpayer filed.

Dec. 14—Notice issued placing proceeding on Washington, D. C., Calendar.

1938

Oct. 7—Hearing set Dec. 5, 1938.

Nov. 28—Motion for a continuance to Dec. 14, 1938, or a date early in January 1939, filed by taxpayer. 11/30/38 granted to 12/14/38.

- Dec. 12—Motion for leave to file amended petition, amended petition lodged, filed by taxpayer.
- Dec. 13—Copy of motion for leave to file amended petition and amended petition served on General Counsel.
- Dec. 14—Hearing had before Mr. Murdock on merits. Submitted. On motion of respondent to file amended answer—granted Motion of petitioner to file amended reply—granted. Motion and amendment to amended answer filed. Motion and amended reply filed. Stipulation of facts filed. Appearance of John L. Kenefick, Ernest J. Brown filed.
- Dec. 28—Transcript of hearing of Dec. 14, 1938, filed.

1939

- Jan. 12—Brief filed by taxpayer. 1/12/39 copy served.
- Feb. 16—Motion for extension to March 10, 1939 to file brief, filed by General Counsel. Brief lodged 3/10/39—Granted 3/11/39.
- Mar. 21—Stipulation to correct transcript filed.
- Mar. 27—Reply brief filed by taxpayer. 3/27/39 copy served.
- May 19—Opinion rendered, Mr. Murdock, Div. 3. Decision will be entered under Rule 50.
- June 13—Computation of deficiency filed by General Counsel.
- June 15—Hearing set July 5, 1939 on settlement.
- June 23—Consent to settlement filed by taxpayer.
- June 30—Decision entered, J. R. Murdock, Div. 3.
- Sept. 22—Petition for review by U. S. Circuit Court of Appeals (2) with assignments of error filed by General Counsel.
- Sept. 30—Proof of service filed by General Counsel. 4—3 attorneys and taxpayer.
- Oct. 10—Praecipe filed.
- Oct. 20—Proof of service of filing praecipe filed by General Counsel.
- Oct. 21—Agreed amended praecipe for record filed with proof of service thereon.

## Before United States Board of Tax Appeals

Docket No. 84639

[Same title.]

*Petition*

Filed May 25, 1936

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of

Internal Revenue in his notice of deficiency dated February 27, 1936 (IT:AR:A-2 MEW-90D), and as a basis of her proceeding alleges as follows:

1. At all the times hereinafter mentioned petitioner was and still is a resident of the Village of East Aurora, County of Erie and State of New York.

2. The notice of deficiency (a copy of which is attached hereto marked "Exhibit A") was mailed to the petitioner on February 27, 1936.

3. The tax in controversy is an income tax for the calendar year 1933, and amounts to the sum of \$86,937.47.

4. The determination of tax set forth in said deficiency letter is based upon the following errors:

#### I

The disallowance by the Commissioner of Internal Revenue of a credit of \$381.78 against petitioner's income tax on account of British income taxes withheld from dividends paid petitioner by an incorporated English company.

5

#### II

The determination by the Commissioner of Internal Revenue that a dividend of \$672.00 received by petitioner from the Great Southern Lumber Company is taxable to petitioner to the extent of 83.6544% thereof.

#### III

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain shares of the common stock of United States Steel Corporation and American Telephone & Telegraph Company, and of certain bonds of the Federal Land Banks of Louisville, Kentucky, and Columbus, Ohio, which petitioner had acquired from her father's testamentary trustees, and which had theretofore been purchased by said trustees, was the cost of said securities to said trustees.

#### IV

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain shares of the capital stock of The Atchison, Topeka, & Santa Fe Railway Company, which petitioner had acquired from her father's testamentary trustees, was as follows:

i. As to so much thereof as was purchased by her father prior to his death, the fair market value of said securities on the date of their distribution by her father's executors to her father's testamentary trustees.

6 ii. As to so much thereof as was purchased by her father's testamentary trustees, the cost thereof to said trustees.

## V

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain corporate stock of the City of New York issued for water supply purposes (4's of 1959) and of certain shares of the capital stock of Southern Pacific Railroad Company, Hotels Statler Company, Inc., and Union Pacific Railroad Company, which petitioner had acquired from her father's testamentary trustees, and which had been purchased by her father prior to his death, was the fair market value of said securities on the date of the distribution thereof by her father's executors to her father's testamentary trustees.

## VI

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain bonds of the Cities of Philadelphia, Pennsylvania; Auburn, New York; and Rochester, New York, which petitioner had acquired from her father's testamentary trustees, and which had theretofore been purchased by her father's executors, was the fair market value of said securities on the date of the distribution thereof by her father's executors to her father's testamentary trustees.

## VII

7 The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain shares of the \$25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation which petitioner had acquired from her father's testamentary trustees, and of certain shares of the common stock and warrants of Niagara Hudson Power Corporation which were derived from stock which petitioner had acquired from her father's testamentary trustees, was as follows:

- i. As to so much thereof as was purchased by her father's executors, the cost thereof to said executors.
- ii. As to so much thereof as was purchased by her father's testamentary trustees, the cost thereof to said trustees.

## VIII

The determination by the Commissioner of Internal Revenue that on petitioner's sale during the calendar year 1933 of 10,000 shares of the capital stock of F. W. Woolworth Company, petitioner derived a capital gain of \$318,128.92 instead of sustaining a capital loss of \$278,854.33, upon the grounds:

- i. That in the application of the "first-in—first-out" rule, the order of acquisition should be determined by employing the dates as of which petitioner's cost basis is ascertained rather than the dates on which petitioner physically acquired the securities; and, therefore, that all of the stock sold must be deemed to be out of lots acquired by petitioner from her father's estate; and

- 8 ii. That petitioner's cost basis in stock distributed to her by her father's testamentary trustees, and which had theretofore been purchased by her father prior to his death, is the fair market value of said stock on July 1, 1921, the date of the distribution thereof by her father's executors to her father's testamentary trustees.

## IX

The disallowance by the Commissioner of Internal Revenue of an ordinary loss of \$5,250.00 sustained by petitioner on the sale during the calendar year 1933 of \$50,000.00 face amount of New York City corporate stock (4½'s of 1957), upon the ground that petitioner acquired substantially identical securities in the same amount within thirty days before or after said sale.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

## I

- (a) Throughout the year 1933 petitioner was the owner, among other things, of certain shares of stock of F. W. Woolworth & Co., Ltd., a British incorporated company.

- (b) On various dates during said year 1933 there became payable to petitioner, dividends in respect of her said shares in said F. W. Woolworth & Co., Ltd., in the aggregate amount of \$1,527.12.

- (c) Upon information and belief, said dividends were subject to a British income tax under the English law, and the payor

company, in each case, is required to withhold from the dividends paid the amount of said tax. The amount of said tax withheld on petitioner's dividends from the above source was \$381.78 in American funds.

(d) In her income tax return for the calendar year 1933, filed with the Collector of Internal Revenue at Buffalo, New York, on or about March 15, 1934, petitioner included in gross income the gross dividend payable to her of \$1,527.12, and inserted in item 38 of her said return for that year the amount of \$381.78, the tax withheld.

(e) Respondent, in his deficiency letter, among other things, while allowing a deduction from gross income on account of said foreign tax of \$381.78, has failed to allow any part of said amount as a credit against petitioner's alleged deficiency.

## II

(f) On July 1, 1933, and for some time prior thereto petitioner was the owner of 224 shares of the capital stock of Great Southern Lumber Company, a Pennsylvania corporation with its principal office in the City of Harrisburg, Pennsylvania.

(g) Said Great Southern Lumber Company, in the year 1933, and for many years prior thereto, was the owner of a large quantity of long leaf yellow pine timber situated in the northern part of the State of Louisiana, and owned and operated a sawmill in the City of Bogalusa, Louisiana. In the year 1933 the corporation's land, to a very large extent, had been cut over and stripped of its stand, and in that year the corporation was approaching the end of its timber operation. During said year and for several years prior thereto the corporation had taken steps toward gradual liquidation.

(h) Prior to January 21, 1933, the Great Southern Lumber Company had an authorized issue of capital stock consisting of 160,000 shares of the par value of \$80.00 each, all of which said shares were common stock and amounted in the aggregate to \$12,800,000.00.

(i) At a meeting of the board of directors of the Great Southern Lumber Company held January 21, 1933, a meeting of the stockholders of said corporation was called to be held on April 26, 1933, for the purpose of voting upon a proposition for a reduction of the capital stock of said corporation from \$12,800,000.00 to \$12,320,000.00, to be effected by a reduction of the par value of the corporation's shares from \$80.00 to \$77.00 per share. Said meeting of the stockholders was duly held on April 26, 1933, and the following resolutions were duly adopted:

"Resolved, That the capital of Great Southern Lumber Company be authorized to be reduced from \$12,800,000.00 to \$12,320,000.00, the same to be effected by a reduction in the par value of shares;

"Resolved, That the actual reduction in the said corporation's capital stock shall be made by its Board of Directors at such time as the said Board, in its discretion, shall determine."

11 "Resolved, That the par value of shares of capital stock of Great Southern Lumber Company be, and the same are, hereby authorized to be reduced from \$80.00 per share to \$77.00 per share, so that the capital stock of the company thereafter shall consist of 160,000 shares with a par value of \$77.00, aggregating, at par, \$12,320,000.00;

"Resolved, That the actual reduction in the par value of said shares of said corporation shall be made by its Board of Directors at such time as the said board, in its discretion, shall determine."

(j) The Judges' Return of Election to reduce the capital stock and to change the par value of the corporation's shares were thereafter duly filed in the office of the Secretary of the Commonwealth of Pennsylvania.

(k) At a meeting of the board of directors of said Great Southern Lumber Company held on June 27, 1933, the following resolution was duly adopted:

"Resolved: That the capital stock of this Company be, and the same is hereby actually reduced from \$12,800,000.00 to \$12,320,000.00;

"Resolved: That the par value of shares of capital stock of this company be, and the same is hereby reduced from \$80.00 per share to \$77.00 per share."

12 (l) Thereafter, and in accordance with statutory proceedings for the reduction of capital stock and the reduction of par value of its shares, and as required by the laws of Pennsylvania, said Great Southern Lumber Company duly paid to its stockholders of record the sum of \$3.00 per share, charging said distribution to its capital stock account, and reducing its authorized and outstanding issue of capital stock accordingly. The par value of each certificate of outstanding capital stock of the corporation was changed from \$80.00 per share to \$77.00 per share.

(m) Petitioner duly deposited certificates representing said 224 shares of the capital stock of said Great Southern Lumber Company, and on July 1, 1933, a partial liquidating dividend of \$672.00 was duly paid to petitioner.

(n) Thereupon there were returned to petitioner certificates representing said 224 shares, having a par value of \$77.00 per share. Petitioner credited the entire amount of said distribution to her personal capital account.

(o) The amount distributed by said Great Southern Lumber Company to petitioner, as aforesaid, was less than the fair market value of said stock on July 3, 1928, the date on which said stock was distributed to petitioner by her fathers' testamentary trustees, and was less than the fair market value of said stock on July 1, 1921, the date on which said stock was distributed by her father's executors to his testamentary trustees, as adjusted on account of intervening distributions from capital, and petitioner did not include any part of the amount so received in her taxable net income for the year 1933.

(p) The Commissioner of Internal Revenue, in his final determination, has included in petitioner's taxable net income an amount of \$562.16 of the total distribution of \$672.00 from said Great Southern Lumber Company, above described, upon the ground that 83.6544% of said distribution to petitioner was taxable to her.

## 13

## III

(q) Petitioner's father, Seymour H. Knox, died on May 16, 1915, leaving a last will and testament, by the provisions of which the testator, after directing payment of his debts and the making of certain specific bequests, provided, in part, as follows, with respect to the disposition of his residuary estate:

"(D) Twenty (20) per cent of all the rest, residue and remainder of my said estate (not including, however, the shares of capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first) I give, devise and bequeath to my brother, Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, in trust nevertheless, for the following uses and purposes, to wit:

"To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my said trustees shall seem wise and proper toward the support, maintenance and education of my daughter, Marjorie Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over the accumulated income to her when she shall arrive at the age of twenty-one (21) years, and there-

after to pay over the entire net income to my said daughter, Marjorie Knox, until she shall arrive at the age of twenty-eight (28) years, at which time, I give, devise and bequeath to my said daughter, Marjorie Knox, one-half ( $\frac{1}{2}$ ) of the property then constituting said trust fund and I direct my said trustees 14 to pay over the net income on the remaining one-half ( $\frac{1}{2}$ ) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Marjorie Knox, and to her heirs and assigns forever.

"In the event that my said daughter, Marjorie Knox, shall die before reaching the age of thirty-five (35) years, I give, devise and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Marjorie Knox, if any, surviving her, to be divided among them, share and share alike. And in case there be no issue her surviving, then I give, devise, and bequeath said trust fund unto her heirs."

(r) Pursuant to authority vested in them by the provisions of petitioner's father's will quoted above at paragraph III (q), said testamentary trustees bought the following securities on or about the dates and for the amounts hereinafter stated:

Date	Quantity	Security	Amount
Dec. 31, 1925	600 shares common.....	United States Steel Corporation.....	\$80,287.50
Dec. 31, 1925	150 shares.....	American Telephone & Telegraph Company.....	21,343.75
July 31, 1925	25 shares.....	American Telephone & Telegraph Company.....	2,568.75
May 31, 1923	\$25,000.00 face amount.....	Federal Land Bank bonds (Louisville) (4) $\frac{1}{2}$ s of 1953).	25,126.00
May 31, 1925	\$8,000.00 face amount.....	Federal Land Bank bonds (Columbus) (4) $\frac{1}{2}$ s of 1955).	8,220.00

15 (s) On or about June 1, 1928, said testamentary trustees of petitioner's father's estate received, with respect to said 175 shares of the stock of American Telephone & Telegraph Company, one warrant for each share held. Said warrants entitled the holder thereof to acquire one new share of the stock of said American Telephone & Telegraph Company at \$100.00 per share for each six warrants held.

(t) On or about June 1, 1927, said testamentary trustees received a 40% stock dividend with respect to said 600 shares of the common stock of United States Steel Corporation, increasing their holdings therein to 840 shares.

(u) On or about July 5, 1928, said testamentary trustees distributed to petitioner, among other things, the following securi-

10 GUY T. HELVERING VS. MARJORIE K. CAMPBELL

ties which have been heretofore referred to, and which, on said date, had a fair market value as hereinafter stated:

Quantity	Security	Unit price	Value
840 shares common.....	United States Steel Corporation.....	\$139.50	\$117,180.00
175 shares.....	American Telephone & Telegraph Company.....	177.50	31,062.50
175 warrants.....	American Telephone & Telegraph Company.....	12.25	2,143.60
\$25,000.00 face amount.....	Federal Land Bank bonds (Louisville) (4½'s of 1953).....	100.125	25,031.25
\$8,000.00 face amount.....	Federal Land Bank bonds (Columbus) (5½'s of 1955).....	100.25	8,020.00

16 (v) On or about July 25, 1928, petitioner exercised the rights which she had received from said testamentary trustees, and upon the exercise thereof acquired 29 additional shares of the capital stock of said American Telephone & Telegraph Company at an expenditure of \$2,900.00.

(w) During the calendar year 1933 petitioner duly sold the above described securities on the dates and in the amounts hereinafter stated:

Date	Quantity	Security	Sale price
Dec. 20, 1933	840 shares common.....	United States Steel Corporation.....	\$36,896.66
Dec. 20, 1933	204 shares.....	American Telephone & Telegraph Company.....	22,465.15
Dec. 22, 1933	\$25,000.00 face amount.....	Federal Land Bank bonds (Louisville) (4½'s of 1953).....	20,593.75
Dec. 22, 1933	\$8,000.00 face amount.....	Federal Land Bank bonds (Columbus) (4½'s of 1955).....	6,630.00

(x) In her return for the calendar year 1933 petitioner reported capital losses on the sales of the above securities in the following amounts, and computed as follows:

17 Quantity	Security	Fair market value July 5, 1928	Sale price	Capital loss
840 shares common.....	United States Steel Corporation.....	\$117,180.00	\$36,896.66	\$80,283.34
204 shares.....	American Telephone & Telegraph Company.....			
Value of:				
175 shares.....				\$31,062.50
175 warrants.....				2,143.60
Purchase price of 29 shares.....				2,900.00
\$25,000.00 face amount.....	Federal Land Bank bonds (Louisville) 4½'s of 1953).....	34,106.10	22,465.15	13,640.95
		25,031.25	20,593.75	4,437.50
\$8,000.00 face amount.....	Federal Land Bank bonds (Columbus) 4½'s of 1955).....	8,020.00	6,630.00	1,390.00

(y) The Commissioner of Internal Revenue, in his final determination, has reduced petitioner's cost basis in the above described

securities, and has reduced the capital losses claimed by petitioner on the sales thereof in the following amounts:

18	United States Steel Corporation-----	\$36,892.50
	American Telephone & Telegraph Company-----	9,293.60
	Federal Land Bank bonds (Louisville)-----	605.63
	Federal Land Bank bonds (Columbus)-----	204.00

The Commissioner of Internal Revenue has made said reductions upon the ground that petitioner's cost basis in the above securities is the cost thereof to her father's testamentary trustees, and in determining the said trustees' cost of the Federal Land Bank bonds of Louisville and Columbus has employed said trustees' average cost in those and certain other bonds.

#### IV.

(z) On the date of the death of petitioner's father, May 16, 1915, the latter was the owner of 500 shares of the common capital stock of The Atchison, Topeka & Santa Fe Railway Company, which had a fair market value on that date of and was appraised at \$49,625.00.

(aa) Pursuant to the provisions of petitioner's father's will above quoted at paragraph III (q), 20% of said shares of stock of The Atchison, Topeka & Santa Fe Railway Company, or 100 shares, was distributed by the executors to the testamentary trustees for petitioner on July 1, 1921. Said stock had a fair market value on that date of \$80.50 per share, or a total value of \$8,050.00.

(bb) Thereafter and on April, 30, 1928, said testamentary trustees purchased 4 additional shares of said stock for \$400.00.

(cc) Upon petitioner's attaining the age of 28 years on July 5, 1928, said testamentary trustees distributed said 104 shares of stock of The Atchison, Topeka & Santa Fe Railway Company to petitioner. On that date said shares had a fair market value of \$189.875 per share, or a total value of \$19,747.00.

(dd) On December 20, 1933, petitioner duly sold said 104 shares, receiving therefor \$5,509.94.

(ee) In her return for the calendar year 1933 petitioner claimed a capital loss of \$14,237.06 on the sale of said 104 shares of stock of The Atchison, Topeka & Santa Fe Railway Company, being the difference between the fair market value of said shares at the date they were distributed to her by her father's testamentary trustees, and the sale price thereof.

(ff) The Commissioner of Internal Revenue, in his final determination, has determined that the petitioner's loss on said sale was \$2,940.06, being the difference between the fair market

value of 100 of said shares on the date they were distributed to said testamentary trustees by said executors, plus the trustees' cost of the 4 shares purchased by them in 1928, and the sale price thereof.

## V

(gg) On July 1, 1921, the executors of petitioner's father's estate distributed to the testamentary trustees for petitioner, the following securities which, on that date, had a fair market value as follows:

Quantity	Security	Unit price	Value
\$10,000.00 face amount...	City of New York corporate stock issued for water-supply purposes (4's of 1950).	\$96.50	\$9,650.00
125 shares.....	Southern Pacific Railroad Company.....	74.375	9,296.88
160 shares.....	Hotels Statler Company, Inc.....	75.00	12,000.00
100 shares.....	Union Pacific Railroad Company.....	117.875	11,787.50

(hh) Upon petitioner's attaining the age of 28 years on July 5, 1928, the above-described securities were distributed to her by her father's testamentary trustees. On that date said securities had fair market values as follows:

Quantity	Security	Unit price	Value
\$10,000.00 face amount...	City of New York corporate stock issued for water-supply purposes (4's of 1950).	\$99.4375	\$9,943.75
125 shares.....	Southern Pacific Railroad Company.....	122.25	15,281.25
160 shares.....	Hotels Statler Company, Inc.....	100.00	16,000.00
100 shares.....	Union Pacific Railroad Company.....	195.00	19,500.00

(ii) Thereafter and on December 28, 1929, a 100% stock dividend of 160 shares was declared and received by petitioner on her holdings of the stock of Hotels Statler Company, Inc., bringing her total holdings of said stock to 320 shares.

(jj) Thereafter petitioner sold the above described securities on the dates and for the amounts following:

Date	Quantity	Security	Sale price
Dec. 21, 1933	\$10,000.00 face amount...	City of New York corporate stock issued for water supply purposes (4's of 1950).	\$7,837.50
Dec. 20, 1933	125 shares.....	Southern Pacific Railroad Company.....	2,381.87
Dec. 20, 1933	320 shares.....	Hotels Statler Company, Inc.....	2,833.00
Dec. 20, 1933	100 shares.....	Union Pacific Railroad Company.....	11,191.00

(kk) In her return for the calendar year 1933 petitioner claimed capital losses on the above sales measured by the differ-

ence between the fair market values of said securities on July 5, 1928, the date on which they were distributed to her by said testamentary trustees, and the said prices, as follows:

City of New York corporate stock issued for water supply purposes (4's of 1959).....	\$2,106.25
Southern Pacific Railroad Company.....	12,899.38
Hotels Statler Company, Inc.....	13,166.40
Union Pacific Railroad Company.....	8,309.00

22 (ll) The Commissioner of Internal Revenue, in his final determination, has determined that petitioner's capital losses on the sales of the above securities should be the difference between their fair market values on July 1, 1921, the date on which said securities were distributed by petitioner's father's executors to his testamentary trustees, and the sale prices thereof, and has reduced said losses by the following amounts:

City of New York corporate stock issued for water supply purposes (4's of 1959).....	\$293.75
Southern Pacific Railroad Company.....	5,984.37
Hotels Statler Company, Inc.....	4,000.00
Union Pacific Railroad Company.....	7,712.50

## VI

(mm) On July 1, 1921, the executors of the estate of petitioner's father distributed to the testamentary trustees for petitioner, pursuant to the provisions of the will above quoted at paragraph III (q), \$50,000.00 face amount of the bonds of the City of Philadelphia (4's of 1946), \$10,000 face amount of the bonds of the City of Auburn, New York (4¾'s of 1933), and \$20,000.00 face amount of the bonds of the City of Rochester, New York (4½'s of 1933).

(nn) Upon information and belief, the Commissioner of Internal Revenue has determined the fair market value of said City of Philadelphia bonds on the date of said distribution to be \$50,687.50, of said City of Auburn bonds to be \$10,227.83, and of said City of Rochester bonds to be \$20,082.50.

23 (oo) When petitioner attained the age of 30 years on July 5, 1928, said testamentary trustees distributed the above described bonds to petitioner. On that date said bonds of the City of Philadelphia had a fair market value of \$108.38 per \$100.00, or an aggregate fair market value of \$54,190.00. On that date said bonds of the City of Auburn had a fair market value of \$102.2783 per \$100.00, or an aggregate fair market value of \$10,227.83, and on said date said bonds of the City of Rochester had a fair market value of \$102.74 per \$100.00, or an aggregate fair market value of \$20,548.00.

(pp) On or about November 10, 1933, petitioner duly sold said bonds of the City of Philadelphia (4's of 1946) for \$42,930.41.

(qq) During said year 1933 all of said bonds of the cities of Auburn and Rochester matured, petitioner receiving on the redemption thereof \$10,000.00 for the City of Auburn bonds and \$20,000.00 for the City of Rochester bonds.

(rr) In her return for the calendar year 1933 petitioner claimed a capital loss on the sale of said City of Philadelphia bonds (4's of 1946) of \$11,259.59, and capital losses on the maturity of the City of Auburn and City of Rochester bonds of \$227.83 and \$548.00, respectively, said claimed losses being the difference between the fair market values of said securities on the date on which they were distributed to petitioner by the said testamentary trustees and the amounts received therefor by the petitioner on her disposition thereof during the calendar year 1933.

(ss) The Commissioner of Internal Revenue, in his final determination, has reduced the capital loss claimed by petitioner 24 on the sale of the City of Philadelphia bonds to \$7,757.09, has held that the loss of \$227.83 claimed by petitioner on the maturity of the City of Auburn bonds was an ordinary and not a capital loss, and that petitioner's loss on the maturity of the City of Rochester bonds should be reduced to \$82.50 and constituted an ordinary loss instead of a capital loss.

## VII

(tt) On June 15, 1925, the executors of the estate of petitioner's father distributed to the testamentary trustees for petitioner, pursuant to the provisions of the will above quoted at paragraph III (q), 214 shares of the common capital stock of Niagara, Lockport & Ontario Power Company, which had theretofore cost said executors \$4,537.06. Said 214 shares had a fair market value on said June 15, 1925, of \$76.00 per share, or an aggregate value of \$16,264.00.

(uu) Thereafter and on or about August 1, 1925, said testamentary trustees exchanged said 214 shares of Niagara, Lockport & Ontario Power Company common stock for 267½ shares of the preferred stock and 267½ shares of the common stock of Buffalo, Niagara & Eastern Power Corporation, said exchange being pursuant to a plan of reorganization to which both said Niagara, Lockport & Ontario Power Company and Buffalo, Niagara & Eastern Power Corporation were parties. On the date of said exchange the fair market value of said common stock of Buffalo, Niagara & Eastern Power Corporation was \$42.375 per share and of the preferred stock of said corporation was \$24.375 per share.

(vv) Thereafter and on August 31, 1925, said testamentary trustees purchased for \$1,202.50, 32½ additional shares of

25 the common stock of said Buffalo, Niagara & Eastern Power Corporation, bringing their total holdings of said common stock to 300 shares.

(ww) On the same date said testamentary trustees purchased 321½ shares of the \$25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation, paying therefor \$780.25.

(xx) Subsequently and on or about January 31, 1926, said testamentary trustees purchased 75 shares of the Class "A" common stock of said Buffalo, Niagara & Eastern Power Corporation, paying therefor \$1,500.00.

(yy) Thereafter and on July 5, 1928, the date on which petitioner attained the age of 28 years, said testamentary trustees distributed to her said 300 shares of the \$25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation, which, on that date, had a fair market value of \$26.125 per share, or an aggregate fair market value of \$7,837.50, said 300 shares of the common stock of Buffalo, Niagara & Eastern Power Corporation, which, on that date, had a fair market value of \$40.25 per share, or an aggregate fair market value of \$12,075.00, and said 75 shares of the Class "A" common stock of Buffalo, Niagara & Eastern Power Corporation, which, on that date had a fair market value of \$37.50 per share, or a total fair market value of \$2,812.50.

(zz) Thereafter and on or about August 19, 1929, petitioner exchanged said 300 shares of the common stock of Buffalo, Niagara & Eastern Power Corporation for 1,200 shares of the common stock of Niagara Hudson Power Corporation and 26 300 Class "A" option warrants of said Niagara Hudson Power Corporation, which warrants entitled the holder to purchase at any time on or before October 1, 1944, one share of the corporation's common stock at \$35.00 per share for each warrant held.

(aaa) On the same date (August 19, 1929) the petitioner exchanged said 75 shares of the Class "A" common stock of Buffalo, Niagara & Eastern Power Corporation for 300 shares of the common stock of Niagara Hudson Power Corporation and 75 Class "A" option warrants of said Niagara Hudson Power Corporation, which warrants entitled the holder to purchase at any time on or before October 1, 1944, one share of the corporation's common stock at \$35.00 per share for each warrant held.

(bbb) On said date (August 19, 1929) common stock of said Niagara Hudson Power Corporation had a fair market value of \$26.8125 per share, and the Class "A" option warrants had a fair market value on that date of \$9.125 each. Said exchange was

pursuant to a plan of reorganization to which both said Buffalo, Niagara & Eastern Power Corporation and said Niagara Hudson Power Corporation were parties.

(ccc) Thereafter and on August 8, 1932, pursuant to corporate action taken by the corporation to reduce its capital stock from 45,000,000 shares of the par value of \$10.00 each to 15,000,000 shares of the par value of \$15.00 each, petitioner exchanged her 1,500 shares of old common stock of said Niagara Hudson Power Corporation, having a par value of \$10.00 each, for 500 new shares of common stock of said corporation, having a par value of \$15.00 each, reducing her holdings of such common

27 stock to 500 shares. A corresponding reduction was accomplished in the number of outstanding Class "A" option warrants, by a similar exchange of one for three, petitioner's holdings thereof being reduced to 125 warrants.

(ddd) Subsequently and on December 20, 1933, petitioner duly sold said 500 shares of the common stock of Niagara Hudson Power Corporation for \$2,506.75, said 125 Class "A" option warrants of said corporation for \$40.24, and said 300 shares of the \$25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation for \$4,800.50.

(eee) In her return for the calendar year 1933 which was filed on or about March 15, 1934, with the Collector of Internal Revenue at Buffalo, New York, petitioner reported capital losses on account of the sale of said 500 shares of Niagara Hudson Power Corporation common stock and said 125 Class "A" option warrants of said corporation of \$12,340.51, and on the sale of said 300 shares of \$25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation of \$3,037.00, the amounts of said losses being the difference between the fair market value of said securities on July 5, 1928, the date of distribution thereof to petitioner by her father's testamentary trustees, and the sale price thereof.

(fff) The Commissioner of Internal Revenue, in his final determination, has reduced the capital loss claimed by petitioner on the sale of said 500 shares of common stock and 125 Class "A" option warrants of Niagara Hudson Power Corporation to \$3,035.78, and has disallowed the loss claimed by petitioner on the sale of said 300 shares of \$25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation  
28 and has determined a capital gain thereon of \$2,363.46.

In determining the adjusted loss on the Niagara Hudson Power Corporation common stock and the Class "A" option warrants of said corporation, the Commissioner of Internal Revenue has used that part of the cost to the executors of petitioner's father's estate of said 214 shares of Niagara, Lockport & Ontario

Power Company common stock which is allocable to the 267½ shares of common stock of Buffalo, Niagara & Eastern Power Corporation received by the testamentary trustees on the exchange of August 1, 1925, plus the said trustees' cost of the 32½ additional shares of common stock of Buffalo, Niagara & Eastern Power Corporation purchased by them on August 31, 1925, plus the said trustees' cost of the 75 shares of Class "A" common stock of Buffalo, Niagara & Eastern Power Corporation purchased by them on January 31, 1928, or an aggregate adjusted cost basis of \$5,582.77.

(ggg) In determining a gain on the sale of the said preferred stock of Buffalo, Niagara & Eastern Power Corporation, the Commissioner of Internal Revenue has used as the cost basis that part of the said executors' cost of the 214 shares of common stock of Niagara, Lockport & Ontario Power Company which is allocable to the 267½ shares of said preferred stock of Buffalo, Niagara & Eastern Power Corporation received by said testamentary trustees on the exchange of August 1, 1925, plus the cost to said trustees of the 32½ shares of Buffalo, Niagara & Eastern Power Corporation preferred stock purchased by them on August 31, 1925, or an aggregate adjusted cost basis of \$2,437.04.

### VIII

(hhh) On July 1, 1921, petitioner's father's executors distributed to the testamentary trustees for petitioner, in accordance with the terms of the will above quoted at paragraph III (q), 4,964 shares of the stock of F. W. Woolworth Company, having a par value of \$100.00 per share, which, on that date, had a fair market value of \$110.00 per share, or an aggregate fair market value of \$546,040.00.

(iii) Subsequently and on or about June 30, 1924, said trustees, pursuant to proper corporate action by which the par value of the shares of stock of said F. W. Woolworth Company was reduced from \$100.00 each to \$25.00 each, exchanged said 4,964 shares of the \$100.00 par value F. W. Woolworth Company stock for 19,856 shares of the \$25.00 par value F. W. Woolworth Company stock.

(jjj) On or about January 31, 1925, said testamentary trustees purchased for \$16,344.00 in cash, 144 additional shares of the stock of said F. W. Woolworth Company, having a par value of \$25.00 each, out of which 125 shares were sold on December 31, 1925, at a profit. Out of the lot of 19,856 shares of said stock acquired on the exchange of June 30, 1924, said trustees, on December 31, 1925, sold 125 shares at a profit. On January 31, 1926, said trustees purchased 250 additional shares of said stock for \$50,925.00.

(kkk) On February 1, 1927, said F. W. Woolworth Company declared a 50% stock dividend, the said trustees receiving thereon 10,000 shares, bringing their total holdings of said stock to 30,000 shares.

(lll) Upon petitioner's attaining the age of 28 years on July 3, 1928, said trustees duly distributed to her one-half of their holdings of said F. W. Woolworth Company stock, namely, 30 15,000 shares, of the par value of \$25.00 each, which, on that date, had a fair market value of \$183.875 per share, or a total fair market value of \$2,758,125.00.

(mmm) On various dates in 1926 and 1927 petitioner purchased individually 1,000 shares of said F. W. Woolworth Company stock, having a par value of \$25.00 each, for \$118,691.58.

(nnn) Thereafter and on June 24, 1929, after proper corporate action further reducing the par value of the corporation's shares from \$25.00 each to \$10.00 each, petitioner exchanged, on the basis of two and one-half for one, the block of 1,000 shares of said F. W. Woolworth Company stock which she had purchased individually and the block of 15,000 shares of said stock which she had acquired from her father's testamentary trustees, receiving in lieu thereof in stock having a par value of \$10.00 per share, 2,500 shares and 37,500 shares, respectively.

(ooo) On various dates in December 1933, petitioner duly sold all of said 2,500 shares which represented her individual purchases of said F. W. Woolworth Company stock for \$99,051.03, and from the lot of 37,500 shares of said stock acquired from her father's testamentary trustees she sold 7,500 shares for \$292,411.22.

(ppp) In her return for the calendar year 1933 petitioner claimed a capital loss on the sale of said stock of \$278,854.33, being the difference between the aggregate of petitioner's cost of the stock which she had purchased individually in 1926 and 1927 and the fair market value of so much of said stock which she had acquired from said testamentary trustees on the date of the distribution thereof to her, and the sale price thereof.

31 (qqq) The Commissioner of Internal Revenue, in his final determination, has disallowed said capital loss on the sale of said F. W. Woolworth Company stock and has determined a capital gain of \$318,128.92, upon the ground that, as a result of the exchange on the basis of two and one-half for one, which occurred on June 24, 1929, the identity of petitioner's shares of stock of F. W. Woolworth Company was lost, that the "first-in—first-out" rule must be applied, and, therefore, that the 10,000 shares sold in December 1933, must be deemed to have been out of the lot of 37,500 shares of said stock which petitioner acquired from said testamentary trustees on July 5, 1928, and that peti-

tioner's cost basis therein is the fair market value of said shares on the date of the distribution thereof by the executors of petitioner's father's estate to said testamentary trustees.

### IX

(rrr) On or about December 29, 1932, petitioner purchased \$25,000.00 face amount of the corporate stock of the City of New York (4½'s due May 1, 1957) issued September 10, 1907, paying therefor \$23,500.00. On the same date petitioner purchased \$25,000.00 face amount of the corporate stock of the City of New York (4½'s due November 1, 1957) issued February 14, 1908, paying therefor \$23,500.00. Both lots of bonds were registered securities.

(sss) Thereafter and on or about December 18, 1933, petitioner duly sold all of said bonds, receiving therefor on said sale \$41,750.00.

(ttt) Subsequently and on or about December 23, 1933, petitioner purchased \$10,000.00 face amount of the corporate stock of the City of New York (4½'s due May 1, 1957) issued September 10, 1907, paying therefor \$8,512.50.

(uuu) In her return for the calendar year 1933 petitioner reported an ordinary loss on the sale of \$50,000.00 face amount of said corporate stock of the City of New York (4½'s due May 1, 1957, and 4½'s due November 1, 1957) acquired in December 1932, of \$5,250.00.

(vvv) The Commissioner of Internal Revenue, in his final determination, has disallowed all of said loss, upon the ground that petitioner acquired substantially identical securities in the same amount within thirty days before or after said sale.

6. Wherefore, petitioner prays that this Board may hear the proceeding and determine that:

### I

Petitioner is entitled to a credit of \$381.78 against her 1933 income tax on account of British income taxes withheld at the source by the payor foreign corporation on dividends received by petitioner therefrom.

### II

The distribution of Great Southern Lumber Company received by petitioner during the calendar year 1933 was a partial liquidating dividend of said Great Southern Lumber Company, properly chargeable to the corporation's capital stock account,

and was not a distribution of earnings or profits taxable to petitioner under the provisions of the Revenue Act of 1932.

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## III

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain shares of the common stocks of United States Steel Corporation and American Telephone & Telegraph Company, and of certain bonds of the Federal Land Banks of Louisville, Kentucky, and Columbus, Ohio, petitioner's cost basis is the fair market value of said securities on July 5, 1928, the date on which they were distributed to petitioner by her father's testamentary trustees.

## IV

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain shares of the capital stock of The Atchison, Topeka & Santa Fe Railway Company, petitioner's cost basis is the fair market value of said securities on July 5, 1928, the date on which they were distributed to petitioner by her father's testamentary trustees.

## V

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain corporate stock of the City of New York (4's of 1959) and certain shares of the capital stocks of Southern Pacific Railroad Company, Hotels Statler Company, Inc., and Union Pacific Railroad Company, petitioner's cost basis is the fair market value of said securities on July 5, 1928, the date on which they were distributed to petitioner by her father's testamentary trustees.

34

## VI

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain bonds of the Cities of Philadelphia, Pennsylvania, Auburn and Rochester, New York, petitioner's cost basis is the fair market value of said bonds on July 5, 1928, the date on which they were distributed to petitioner by her father's testamentary trustees.

## VII

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain shares of the \$25.00

par value preferred stock of Buffalo, Niagara & Eastern Power Corporation, and of certain shares of the common stock and warrants of Niagara Hudson Power Corporation, petitioner's cost bases were, respectively, the fair market value as of July 5, 1928, of said \$25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation, and the fair market value on that date of the common and Class "A" common stocks of Buffalo, Niagara & Eastern Power Corporation, from which said Niagara Hudson Power Corporation stock and warrants were derived, and which were distributed on said July 5, 1928, to petitioner by her father's testamentary trustees.

## VIII

Petitioner sustained a capital loss of \$278,854.33 on the sale during the calendar year 1933 of 10,000 shares of the capital stock of F. W. Woolworth Company, upon the ground:

- 35 i. That, for the purpose of applying the "first-in—first-out" rule, the dates of acquisition should be the dates on which petitioner physically acquired her holdings of said stock and not the dates as of which petitioner's cost basis in said holdings is determined, and, therefore, that petitioner's purchases of said stock prior to July 5, 1928, must be exhausted first; and
- ii. That on so much of said stock as was acquired by petitioner from her father's testamentary trustees, petitioner's cost basis is the fair market value thereof on July 5, 1928, the date on which said securities were distributed to her by said trustees.

## IX

Petitioner sustained an ordinary loss of \$4,200.00 on \$40,000.00 face amount (out of a total of \$50,000 face amount) of New York City corporate stock (4½'s of 1957) sold by petitioner during the calendar year 1933; that not in excess of \$10,000.00 face amount of substantially identical securities was reacquired within thirty days before or after the date of said sale.

(S) RALPH M. ANDREWS,  
Counsel for Petitioner,  
Office and Post-Office Address,  
1330 Marine Trust Building,  
239 Main Street, Buffalo, New York.

22 GUY T. HELVERING VS. MARJORIE K. CAMPBELL

37 *Exhibit A annexed to petition*

SN-A.

OFFICE OF COMMISSIONER OF INTERNAL REVENUE,  
TREASURY DEPARTMENT,  
Washington, Feb. 27, 1936.

Address Reply to Commissioner of Internal Revenue and Refer to—

Mrs. MARJORIE K. CAMPBELL,  
2100 Rand Building, Buffalo, New York.

MADAM: You are advised that the determination of your income tax liability for the taxable year 1933 discloses a deficiency of \$86,937.47 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,  
Commissioner.

By CHAS. T. RUSSELL,  
Deputy Commissioner.

Enclosures:  
Statement.  
Form 870.

STATEMENT

IT:AR:A-2.  
MEW-90D.

In re: Mrs. Marjorie K. Campbell  
2100 Rand Building  
Buffalo, New York

Income Tax Liability

Year, 1933; income tax liability, \$86,937.47; income tax assessed, none; deficiency, \$86,937.47.

39 The deficiency shown herein is based upon the report dated November 1, 1935, prepared by Revenue Agent H. E. Murray, a copy of which was transmitted to you under date of December 2, 1935, and the following additional adjustment:

It is noted in a review of your return in this office that you received dividends in the amount of \$1,527.12, less tax of \$381.78, withheld, from the Woolworth Company Limited. The tax withheld was claimed as a credit on line 38 of the return. In this connection you are advised that there is no provision in the revenue laws permitting an individual owning stock in a foreign corporation to claim as a deduction or a credit income tax assessed against a foreign corporation. The Bureau holds that the income tax purported to have been withheld from dividend distributions by the British corporation was in fact the liability of the payor corporation. Therefore, the only amount which should be reported in your gross income is the amount actually received, \$1,527.12 less \$381.78, or \$1,145.34. In the following computation the amount of \$381.78 has been disallowed as a credit and allowed as an additional deduction from income.

A synopsis of your adjusted income tax liability follows:

Income shown on the return exclusive of capital net loss	\$188,810.71
Add:	
1. Loss on sales decreased	5,250.00
2. Dividends adjusted	2,819.66
	\$196,880.37
40 Less:	
3. Fiduciary income overstated	\$2,257.50
4. Contributions allowed	3,321.00
5. Other deductions allowed	2,436.73
6. Foreign tax adjustment	381.78
	8,397.01
Adjusted income for surtax	\$188,483.36
Less:	
Dividends	\$200,728.31
Personal exemption and credit for dependents	3,200.00
	203,928.31
Balance subject to normal tax	None
Surtax on \$188,483.36	\$65,316.83
Tax at 12½% on adjusted capital net gain of \$173,325.00	21,665.62
Total tax	\$86,982.47
Less: Tax paid at source	45.00
Corrected income tax liability	\$86,937.47
Income tax assessed, original account No. 664031	None
Deficiency in tax	\$86,937.47

#### 41 Explanation of Changes

1. Loss is decreased and income increased by \$5,250.00, due to eliminating a loss claimed on the sale of City of New York

bonds on December 22, 1933. Since you bought substantially identical bonds on December 23, 1933, the transaction represents a wash sale, and the loss from such is not recognized under the provisions of section 118 (a) of the Revenue Act of 1932.

2. Dividend adjustment consists of two items, \$2,257.50 of which is explained in item 3, and \$562.16 represents 83.6544 per cent of \$672.00 received from the Great Southern Lumber Co. representing the taxable portion of the dividends distributed by the company in 1933.

3. Fiduciary income has been decreased and dividends increased by \$2,257.50, the 5 per cent tax withheld on dividends distributable from the Marjorie Knox Campbell Trust. The tax withheld should be applied as a deduction against other fiduciary income from the same source and not against gross dividends.

4. Due to increases in income, the deduction of \$3,321.00 for contributions is now allowed.

5. Losses of \$227.83 sustained on redemption of City of Auburn bonds, and \$2,208.90 on City of Rochester bonds, or a total of \$2,436.73 have been transferred from capital net loss to other deductions in accordance with I. T. 2678 (Cumulative Bulletin XII-1, page 117) which holds that loss sustained or gain realized from the redemption of bonds which have been held for more than two years may not be taxed as capital assets.

42 6. The adjustment of \$381.78 for foreign taxes has been explained above.

Capital net loss reported as \$527,764.97 has been changed to a gain of \$173,325.00, or a net increase of \$701,089.97, due mainly to adjustments to the cost basis used or applicable to the securities sold. It is noted that in the sale of the securities, which you received from the Marjorie Knox Campbell Trust, you used the values as at August 5, 1928, the date the trustee transferred the stocks to you.

The Bureau has used the fair market values as at July 1, 1921, for the securities transferred to the trustee when the trust was set up or the actual costs to the trustee of the stocks purchased by him. The trust was created under the will of Seymour H. Knox, who died on May 16, 1915.

Section 113 (a) (5) of the Revenue Act of 1932 provides that the cost basis of property acquired by general bequest shall be its fair market value at the date of distribution to the beneficiary. The date of distribution is held to be July 1, 1921, the date the securities were transferred by the executor of the estate to the trustee. Under General Counsel Memorandum 14893 (Internal Revenue Bulletin XIV No. 21, page 11), on July 1,

1921, you actually became entitled to the income from the property and later to the possession of the property or its equivalent.

An analysis of your account with the Woolworth stock shows that through the  $2\frac{1}{2}$  for 1 exchange in 1929 the identity of your various holdings in this stock was lost.

Therefore, in accordance with article 600 (4) of Regulations 77, the 10,000 shares sold in 1933 have been held to have come from the earliest acquisitions of the stock. This adjustment, which comprises the greater portion of the increase of \$701,089.97, is as follows:

43	7,500 shares value at July 5, 1928, used by you-----	\$551,625.00
	2,500 shares cost to you in 1926, 1927-----	118,691.58
	Total cost used by you-----	\$670,316.58
	Value as at July 1, 1921, of 666 $\frac{2}{3}$ shares at 100 (represented by the 10,000 shares sold)-----	73,333.33
	Cost overstated-----	\$596,983.25

In compliance with your request dated February 4, 1936, this final notice of deficiency is now being forwarded.

44 Before United States Board of Tax Appeals

Docket No. 84639

(Same title.)

*Answer*

Filed July 24, 1936

The Commissioner of Internal Revenue by his attorney, Herman Oliphant, General Counsel for the Department of the Treasury, for answer to the petition filed in the above entitled appeal, admits, denies, and avers as follows:

1. Admits the allegations contained in paragraph 1 of the petition.
2. Admits the allegations contained in paragraph 2 of the petition.
3. Admits that the tax in controversy is income tax for the calendar year 1933. Denies that the amount in controversy is as alleged in paragraph 3 of the petition.
4. I. Admits that the Commissioner disallowed an amount of \$381.78 claimed as a credit on petitioner's income tax return. Denies that the Commissioner thereby erred, and denies all other allegations, if any, contained in subparagraph 1 of paragraph 4 of the petition.

II. Admits that the Commissioner determined that a dividend of \$672.00 received by petitioner from the Great Southern Lumber Company is taxable to the petitioner to the extent of 83.6544% thereof. Denies that the Commissioner thereby erred.

III. Admits that the Commissioner determined that petitioner's basis for the purpose of determining gain or loss on the sale during the calendar year 1933 of certain shares of the common stock of United States Steel Corporation and American Telephone & Telegraph Company, and of certain bonds of the Federal Land Banks of Louisville, Kentucky, and Columbus, Ohio, which had theretofore been acquired by the testamentary trustees for petitioner's benefit was the cost thereof to the trustees. Denies that the Commissioner thereby erred, and denies all other allegations contained in subparagraph III of paragraph 4 of the petition.

IV, V, VI, & VII. Denies all the allegations contained in subparagraphs IV, V, VI, and VII of paragraph 4 of the petition.

VIII. Admits that the Commissioner determined that on petitioner's sale during the calendar year 1933 of 10,000 shares of the capital stock of F. W. Woolworth Company, petitioner realized a capital gain of \$318,128.92 instead of sustaining a capital loss of \$278,854.33. Admits that in determining said capital gain the Commissioner applied the "first-in—first-out" rule. Denies that the Commissioner thereby erred, and denies all other allegations contained in subparagraph VIII of paragraph 4 of the petition.

IX. Admits that the Commissioner disallowed \$5,250.00 claimed by petitioner on her return as an ordinary loss sustained on the sale during the calendar year 1933 of \$50,000.00 face amount of New York City bonds (4½'s of 1957) upon the ground that petitioner acquired substantially identical securities within thirty days before or after said sale. Denies that the Commissioner thereby erred, and denies all other allegations, if any, contained in subparagraph IX of paragraph 4 of the petition.

X. In the event it be determined that the Commissioner overstated petitioner's net income for 1933, respondent avers that petitioner's deduction for contributions should be reduced to an amount not exceeding 15% of the net income as redetermined.

5 I (a). Admits all the allegations contained in subparagraph I (a) of paragraph 5 of the petition.

I (b). Admits that on various dates during the year 1933 there became payable to the petitioner dividends in respect

of her shares of stock of F. W. Woolworth & Co., Ltd. Denies that said dividends amounted in the aggregate to \$1,527.12.

I (c). Denies all the allegations contained in subparagraph I (c) of paragraph 5 of the petition.

I (d). Admits that in her income tax return for the calendar year 1933 filed with the Collector of Internal Revenue at Buffalo, New York, on or about March 15, 1934, petitioner included in gross income \$1,527.12 as dividends received on the stock owned by her in F. W. Woolworth & Co., Ltd., and claimed a credit of \$381.78 under item 38 of said return as tax withheld by the British government on said dividends. Denies all other allegations, if any, contained in subparagraph I (d) of paragraph 5 of the petition.

I (e). Admits that the Commissioner did not allow any part of the \$381.78 as a credit. Denies all other allegations 47 contained in subparagraph I (e) of paragraph 5 of the petition, and avers that the Commissioner included only \$1,145.34 in petitioner's gross income as dividends received from F. W. Woolworth & Co., Ltd.

II (f). Admits that on July 1, 1933, and for some time prior thereto, petitioner was the owner of 224 shares of the capital stock of Great Southern Lumber Company. Denies all other allegations contained in subparagraph II (f) of paragraph 5 of the petition.

II (g). Admits that in the year 1933, and for many years prior thereto, Great Southern Lumber Company was the owner of a large quantity of long leaf yellow pine timber situated in the northern part of the state of Louisiana, and owned and operated a sawmill in the city of Bogalusa, Louisiana. Denies all other allegations contained in subparagraph II (g) of paragraph 5 of the petition.

II (h), (i), (j), & (k). Denies all the allegations contained in subparagraphs II (h), (i), (j), and (k) of paragraph 5 of the petition.

II (l). Admits that on or about July 1, 1939, Great Southern Lumber Company paid in cash to the stockholders of record the sum of \$3.00 per share. Denies all other allegations contained in subparagraph II (l) of paragraph 5 of the petition.

II (m). Admits that on July 1, 1933, the Great Southern Lumber Company paid \$672.00 to the petitioner. Denies all other allegations contained in subparagraph II (m) of paragraph 5 of the petition.

48 II (n). Denies all the allegations contained in subparagraph II (n) of paragraph 5 of the petition.

II (o). Admits that the petitioner did not include any part of the amount so received in her taxable net income for the year

1933. Denies all other allegations contained in subparagraph II (o) of paragraph 5 of the petition.

II (p). Admits that the Commissioner included in petitioner's taxable net income for 1933 \$562.16 of the total distribution of \$672.00 from the Great Southern Lumber Company upon the ground that 83.6544% of the total was taxable to the petitioner. Denies all other allegations contained in subparagraph II (p) of paragraph 5 of the petition.

III (q). Admits that petitioner's father, Seymour H. Knox, died on May 16, 1915, leaving a last will and testament, by which a portion of the estate was devised and bequeathed in trust for the benefit of the petitioner. Denies all other allegations contained in subparagraph III (q) of paragraph 5 of the petition.

III (r). Admits that the trustees of the aforesaid trust acquired for the benefit of the petitioner the following securities on or about the dates and for the amounts hereinafter stated:

Date	Quantity	Security	Amount
Dec. 31, 1925	600 shares common	United States Steel Corporation	\$80,287.50
Dec. 31, 1925	150 shares	American Telephone & Telegraph Company	21,343.75
July 31, 1926	25 shares	American Telephone & Telegraph Company	2,568.75

49 Admits that the trustees of the aforesaid trust acquired for the benefit of the petitioner the securities listed below:

Quantity	Security
\$25,000.00 face amount	Federal Land Bank (Louisville) bonds (4½'s of 1953)
\$8,000.00 face amount	Federal Land Bank (Columbus) bonds (4½'s of 1955)

Denies all other allegations contained in subparagraph III (r) of paragraph 5 of the petition.

III (s). Admits that on or about June 1, 1928, the trustees of the aforesaid trust received, with respect to said 175 shares of stock of American Telephone & Telegraph Company, one warrant for each share held. Admits that said warrants entitled the holder thereof to acquire one new share of the stock of American Telephone & Telegraph Company for \$100.00 per share for each six warrants held.

III (t). Admits that on or about June 1, 1927, the trustees of the aforesaid trust received a 40% stock dividend with respect to said 600 shares of common stock of United States Steel Corporation. Denies all other allegations contained in subparagraph III (t) of paragraph 5 of the petition.

III (u). Admits that on or about July 5, 1928, the aforementioned securities were transferred from the trustees of the aforesaid trust to the petitioner. Denies all other allegations

contained in subparagraph III (u) of paragraph 5 of the petition.

50 III (v). Admits that on or about July 25, 1928, petitioner acquired 29 additional shares of the capital stock of American Telephone & Telegraph Company at an expenditure of \$2,900.00 through the exercise of the aforementioned warrants. Denies all other allegations contained in subparagraph III (v) of paragraph 5 of the petition.

III (w). Admits that the petitioner sold the securities listed in subparagraph III (w) of paragraph 5 of the petition on the dates and for the amounts therein stated. Denies all other allegations contained in subparagraph III (w) of paragraph 5 of the petition.

III (x). Admits that in her income tax return for the calendar year 1933 petitioner reported that she sustained capital losses on the sales of the aforesaid securities in the amounts set out below:

Security	Amount reported as capital loss
840 shares of common stock United States Steel Corporation---	\$90,283.34
204 shares American Telephone & Telegraph Company-----	13,640.95
\$25,000.00 face amount Federal Land Bank (Louisville) bonds--	4,437.50
\$8,000.00 face amount Federal Land Bank (Columbus) bonds--	1,300.00

Denies all other allegations contained in subparagraph III (x) of paragraph 5 of the petition.

51 III (y). Admits that the Commissioner held that petitioner's basis for each of the aforesaid securities was less than that claimed by the petitioner; and as a result determined that the capital loss sustained on the sale of the United States Steel Corporation stock was \$36,892.50 less than the amount claimed by the petitioner; that the capital loss sustained on the sale of the American Telephone & Telegraph Company stock was \$9,293.60 less than the amount claimed by the petitioner; that the capital loss sustained on the sale of the Federal Land Bank bonds (Louisville) was \$605.63 less than the amount claimed by the petitioner; and that the capital loss sustained on the sale of the Federal Land Bank bonds (Columbus) was \$204.00 less than the amount claimed by the petitioner. Admits that the Commissioner held that the basis to petitioner for each of the aforesaid securities was the cost thereof to the aforementioned trustees. Denies all other allegations contained in subparagraph III (y) of paragraph 5 of the petition.

IV (z). Admits all the allegations contained in subparagraph IV (z) of paragraph 5 of the petition.

IV (aa). Admits that on or about July 1, 1921, the executors distributed certain shares of the capital stock of The Atchison,

Topeka & Santa Fe Railway Company pursuant to the terms of the last will and testament of petitioner's father, and transferred 100 of said shares to the testamentary trustees of a trust of which petitioner was the sole beneficiary. Admits that on July 1, 1921, the fair market value of said 100 shares of said stock was \$8,050.00. Denies all other allegations contained in subparagraph IV (aa) of paragraph 5 of the petition.

IV (bb). Admits that on April 30, 1928, said testamentary trustees acquired by the exercise of stock rights 4 additional shares of said stock for \$400.00.

52 IV (cc). Admits that upon petitioner's attaining the age of 28 years on July 5, 1928, the testamentary trustees transferred said 104 shares of stock of The Atchison, Topeka & Santa Fe Railway Company to petitioner. Denies all other allegations contained in subparagraph IV (cc) of paragraph 5 of the petition.

IV (dd). Admits that on December 20, 1933, petitioner sold 104 shares of The Atchison, Topeka & Santa Fe Railway Company stock for \$5,509.94.

IV (ee). Admits that on her income tax return for the calendar year 1933 petitioner claimed \$14,237.06 as a capital loss sustained on the sale of 104 shares of stock of The Atchison, Topeka & Santa Fe Railway Company. Denies all other allegations contained in subparagraph IV (ee) of paragraph 5 of the petition.

IV (ff). Admits that the Commissioner determined that petitioner sustained a capital loss of only \$2,940.06 on the sale of said stock, the same being the difference of the fair market value of the 100 shares on July 1, 1921, plus the cost to the trustees of the 4 shares later acquired by them, and the sale price of \$5,509.94. Denies all other allegations contained in subparagraph IV (ff) of paragraph 5 of the petition.

V (gg). Admits that on or about July 1, 1921, petitioner's father's executors distributed the securities listed in subparagraph V (gg) of paragraph 5 of the petition pursuant to the terms of the last will and testament of petitioner's father, and transferred said securities to the testamentary trustees of a trust of which petitioner was the sole beneficiary. Admits that on July 1, 1921,

53 the value of the shares of common stock of Southern Pacific Railroad Company, Hotels Statler Company, Inc., and Union Pacific Railroad Company were as set out in said subparagraph V (gg) of paragraph 5 of the petition. Admits that the value of the \$10,000.00 face amount of City of New York corporate stock issued for water supply purposes (4's of 1959) did not exceed \$9,650.00, and avers that the value of said City of New York corporate stock was \$7,900.00.

V (hh). Admits that upon petitioner's attaining the age of 28 years on July 5, 1928, the securities listed in subparagraph V (hh) of paragraph 5 of the petition were transferred from the testamentary trustees to the petitioner. Denies all other allegations contained in subparagraph V (hh) of paragraph 5 of the petition.

V (ii). Admits that on or about December 28, 1929, petitioner received on the stock of Hotels Statler Company, Inc., a 100% stock dividend of 160 shares. Denies all other allegations contained in subparagraph V (ii) of paragraph 5 of the petition.

V (jj). Admits that petitioner sold securities in the amounts, on the dates, and for the sales prices listed in subparagraph V (jj) of paragraph 5 of the petition.

V (kk). Admits that in her income tax return for the calendar year 1933 petitioner claimed capital losses on the above-mentioned sales in the amounts listed in subparagraph V (kk) of paragraph 5 of the petition. Denies all other allegations contained in subparagraph V (ii) of paragraph 5 of the petition.

V (ll). Admits that the Commissioner held that petitioner's capital losses on the sales of the above-mentioned securities are the differences between the values set out in subparagraph V (gg) of paragraph 5 of the petition and the sales prices set out in subparagraph V (jj) of paragraph 5 of the petition, and as a result determined that the capital loss sustained on the sale of the City of New York corporate stock (4's of 1959) was \$293.75 less than the amount claimed by petitioner; that the capital loss sustained on the sale of the Southern Pacific Railroad Company stock was \$5,984.37 less than the amount claimed by petitioner; that the capital loss sustained on the sale of the Hotels Statler Company, Inc., stock was \$4,000.00 less than the amount claimed by the petitioner; and that the capital loss sustained on the sale of the Union Pacific Railroad Company stock was \$7,712.50 less than the amount claimed by the petitioner. Avers that in determining the capital loss sustained on the sale of the \$10,000.00 face amount of City of New York corporate stock the Commissioner erred in favor of the petitioner by using as the fair market value on July 1, 1921, of said corporate stock the sum of \$9,650.00 rather than the sum of \$7,900.00, the capital loss determined by the Commissioner being thereby overstated by the sum of \$1,750.00. Denies all other allegations contained in subparagraph V (ll) of paragraph 5 of the petition.

VI (mm). Admits that on or about July 1, 1921, petitioner's father's executors distributed \$50,000.00 face amount of the bonds of the City of Philadelphia (4's of 1946), \$10,000.00 face amount

of the bonds of the City of Auburn, New York (4¾'s of 1933), and \$20,000.00 face amount of the bonds of the City of Rochester, New York (4½'s of 1933), pursuant to the terms of the last will and testament of petitioner's father, and transferred said bonds to the testamentary trustees of a trust of which  
55 petitioner was the sole beneficiary. Denies all other allegations contained in subparagraph VI (mm) of paragraph 5 of the petition.

VI (nn). Admits that the Commissioner determined that on the date of said distribution the fair market value of the City of Philadelphia bonds was \$50,687.50, the fair market value of the City of Auburn bonds was \$10,227.83, and the fair market value of the City of Rochester bonds was \$20,082.50.

VI (oo). Admits that on July 5, 1928, the aforesaid bonds were transferred from the testamentary trustees to the petitioner. Denies all other allegations contained in subparagraph VI (oo) of paragraph 5 of the petition.

VI (pp) & (qq). Admits all the allegations contained in subparagraphs VI (pp) and (qq) of paragraph 5 of the petition.

VI (rr). Admits that in her income tax return for the calendar year 1933 petitioner claimed \$11,259.59 as a capital loss sustained on the sale of said City of Philadelphia bonds, and claimed \$227.83 and \$548.00 as capital losses sustained on the redemption of the City of Auburn and City of Rochester bonds, respectively. Denies all other allegations contained in subparagraph VI (rr) of paragraph 5 of the petition.

VI (ss). Admits that the Commissioner determined that a capital loss of only \$7,757.09 was sustained on the sale of the City of Philadelphia bonds; determined that the loss of \$227.83 on the redemption of the City of Auburn bonds was an ordinary and not a capital loss; and determined that the loss  
56 sustained on the redemption of the City of Rochester bonds was only \$82.50 and was an ordinary loss instead of a capital loss. Denies all other allegations contained in subparagraph VI (ss) of paragraph 5 of the petition.

VII (tt). Admits that on or prior to June 15, 1925, the trustees of the aforesaid testamentary trust acquired for petitioner's benefit 214 shares of the common stock of Niagara, Lockport & Ontario Power Company. Denies all other allegations contained in subparagraph VII (tt) of paragraph 5 of the petition.

VII (uu). Admits all the allegations contained in subparagraph VI (uu) of paragraph 5 of the petition.

VII (vv). Admits that on August 31, 1925, the testamentary trustees purchased for \$1,202.50 32½ additional shares of the common stock of Buffalo, Niagara & Eastern Power Corporation.

VII (ww) & (xx). Admits all the allegations contained in subparagraphs VII (ww) and (xx) of paragraph 5 of the petition.

VII (yy). Admits that upon petitioner's attaining the age of 28 years on July 5, 1928, the testamentary trustees transferred the 300 shares of preferred stock, 300 shares of common stock, and 75 shares of Class "A" common stock of Buffalo, Niagara & Eastern Power Corporation to petitioner. Denies all other allegations contained in subparagraph VII (yy) of paragraph 5 of the petition.

VII (zz). Admits that in 1929 petitioner exchanged said 300 shares of common stock of Buffalo, Niagara & Eastern Power Corporation for 1,200 shares of common capital  
57 stock of Niagara Hudson Power Corporation and 300

Niagara Hudson Power Corporation option warrants. Denies all other allegations contained in subparagraph VII (zz) of paragraph 5 of the petition.

VII (aaa). Admits that in 1929 petitioner exchanged the 75 shares of Class "A" common stock of Buffalo, Niagara & Eastern Power Corporation for 300 shares of the common capital stock of Niagara Hudson Power Corporation and 75 Class "A" option warrants of said Niagara Hudson Power Corporation. Denies all other allegations contained in subparagraph VII (aaa) of paragraph 5 of the petition.

VII (bbb). Admits that the exchanges mentioned in subparagraphs VII (zz) and (aaa) above were transactions governed by Sec. 112 (b) (3) or (b) (5) of the Revenue Act of 1926, and Sec. 113 (a) (6) of the Revenue Act of 1932; and that on the date said exchanges were made, the stock and warrants received each had a substantial fair market value. Denies all other allegations contained in subparagraph VII (bbb) of paragraph 5 of the petition.

VII (ccc). Admits all the allegations contained in subparagraph VII (ccc) of paragraph 5 of the petition.

VII (ddd). Admits that on December 20, 1933, petitioner sold said 500 shares of the common stock of Niagara Hudson Power Corporation for \$2,506.75, and said 125 Class "A" option warrants of said corporation for \$40.24, and said 300 shares of preferred stock of Buffalo, Niagara & Eastern Power Corporation for \$1,800.50.

VII (eee). Admits that in her income tax return for the calendar year 1933, which was filed on or about March 15,  
58 1934, with the Collector of Internal Revenue at Buffalo, New York, petitioner claimed \$12,340.51 as capital losses sustained on the sale of the 500 shares of common stock and

125 Class "A" option warrants of Niagara Hudson Power Corporation. Admits that in said income tax return petitioner claimed \$3,037.00 as a capital loss sustained on the sale of the 300 shares of preferred stock of Buffalo, Niagara & Eastern Power Corporation. Denies all other allegations contained in subparagraph VII (eee) of paragraph 5 of the petition.

VII (fff). Admits that the Commissioner determined that the capital loss sustained by petitioner on the sale of the 500 shares of common stock and 125 Class "A" option warrants of Niagara Hudson Power Corporation was only \$3,035.78. Admits that the Commissioner determined that petitioner realized a capital gain of \$2,363.46 on the sale of the 300 shares of preferred stock of Buffalo, Niagara & Eastern Power Corporation. Admits that the basis determined by the Commissioner for the 500 shares of common stock and 125 Class "A" option warrants of Niagara Hudson Power Corporation was \$5,582.77. Denies all other allegations contained in subparagraph VII (fff) of paragraph 5 of the petition.

VII (ggg). Admits that the basis for the 300 shares of preferred stock of Buffalo, Niagara & Eastern Power Corporation determined by the Commissioner was \$2,437.04. Denies all other allegations contained in subparagraph VII (ggg) of paragraph 5 of the petition.

VIII- (hhh). Admits that on or about July 1, 1921, petitioner's father's executors distributed 4,964 shares of the common stock of F. W. Woolworth Company, having a par value of \$100.00 per share, pursuant to the last will and testament of petitioner's father, and transferred said shares to the testamentary trustees of a trust of which petitioner was the sole beneficiary. Admits that on July 1, 1921, the fair market value of said shares of stock was \$110.00 per share, or an aggregate fair market value of \$546,040.00. Denies all other allegations contained in subparagraph VIII (hhh) of paragraph 5 of the petition.

VIII (iii). Admits all the allegations contained in subparagraph VIII (iii) of paragraph 5 of the petition.

VIII (jjj). Denies all the allegations contained in subparagraph VIII (jjj) of paragraph 5 of the petition.

VIII (kkk). Admits all the allegations contained in subparagraph VIII (kkk) of paragraph 5 of the petition.

VIII (lll). Admits that upon petitioner's attaining the age of 28 years on July 5, 1928, 15,000 shares of F. W. Woolworth Company stock were transferred from the testamentary trustees to petitioner. Denies all other allegations contained in subparagraph VIII (lll) of paragraph 5 of the petition.

VIII (mmm). Admits that on various dates petitioner acquired 1,000 shares of F. W. Woolworth Company stock, having a par value of \$25.00 each. Admits that petitioner expended in connection with the acquisition of this stock the sum of \$118,691.58.

60 VIII (nnn). Admits that on or about June 24, 1929, after proper corporate action further reducing the par value of the corporation's shares from \$25.00 each to \$10.00 each, petitioner's holdings of 16,000 shares of \$25.00 par value common stock of F. W. Woolworth Company were converted into 40,000 shares of \$10.00 par value stock of said company. Denies all other allegations contained in subparagraph VIII (nnn) of paragraph 5 of the petition.

VIII (ooo). Admits that on various dates in December, 1933, petitioner sold 10,000 shares of F. W. Woolworth Company stock for an aggregatae amount of \$391,462.25. Denies all other allegations contained in subparagraph VIII (ooo) of paragraph 5 of the petition.

VIII (ppp). Admits that in her income tax return for the calendar year 1933 petitioner claimed \$278,854.33 as a capital loss sustained on the sale of said stock. Denies all other allegations contained in subparagraph VIII (ppp) of paragraph 5 of the petition.

VIII (qqq). Admits that the Commissioner disallowed said item and determined that petitioner realized a capital gain of \$318,128.92 upon the sale of said 10,000 shares of stock of F. W. Woolworth Company. Admits that the Commissioner held that the identity of petitioner's shares of stock of F. W. Woolworth Company was lost; that the "first in-first out" rule must be applied; that the 10,000 shares sold in December, 1933, must be deemed to have been out of the lot of 37,500 shares of stock transferred on July 5, 1928, from the testamentary trustees to the petitioner; and that petitioner's basis for the shares sold is the fair market value on July 1, 1921, of 666⅔ of F. W. Woolworth Company stock. Denies all other allegations contained in subparagraph VIII (qqq) of paragraph 5 of the petition.

61 IX (rrr). Admits that prior to December 1933, petitioner purchased \$50,000.00 face amount of the corporate stock of the City of New York (4½'s of 1957). Admits that said bonds (corporate stock) were registered securities. Denies all other allegations contained in subparagraph IX (rrr) of paragraph 5 of the petition.

IX (sss). Admits that in December 1933, petitioner sold all of said bonds. Denies all other allegations contained in subparagraph IX (sss) of paragraph 5 of the petition.

IX (ttt). Admits that on or about the same date petitioner purchased corporate stock of the City of New York (4½'s of 1957). Denies all other allegations contained in subparagraph IX (ttt) of paragraph 5 of the petition.

IX (uuu). Admits that in her income tax return for the calendar year 1933 petitioner claimed \$5,250.00 as an ordinary loss sustained on the sale of said corporate stock of the City of New York (4½'s due 1957).

IX (vvv). Admits that the Commissioner disallowed all of said deduction upon the ground that petitioner acquired substantially identical securities within thirty days before or after said sale. Denies all other allegations contained in subparagraph IX (vvv) of paragraph 5 of the petition.

(www). Respondent avers that in determining the deficiency for 1933 the Commissioner allowed petitioner a deduction for contributions in the amount of \$3,321.00.

Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified or denied.

62 6. In further defense of the Commissioner's determination, and in support of an alternative claim to an increased deficiency for the year 1933, respondent relies upon the following additional facts:

(a) With respect to the securities sold by petitioner in the year 1933, which were owned by petitioner's father on the date of his death or derived from securities owned by petitioner's father on the date of his death, such securities were acquired by petitioner by transfer in trust before January 1, 1921; and the bases to petitioner of the securities so acquired were the fair market values thereof on May 16, 1915, as provided in Sec. 113 (a) (4) of the Revenue Act of 1932.

(b) On information and belief, the fair market values of said securities owned by petitioner's father on the date of his death were less than the amounts used as bases by the Commissioner in making his determination, and were less than the respective bases claimed by the petitioner in this proceeding.

(c) With respect to securities sold by petitioner in 1933, which were purchased by the executors or which were derived from securities purchased by the executors, such securities were acquired by petitioner by purchase, and the bases to petitioner of the securities so acquired were the respective costs thereof, viz, the amounts paid by the executors.

(d) On information and belief, the respective costs of such securities were less than the bases used by the Commissioner in his determination, and were less than the bases claimed by the petitioner in this proceeding.

Wherefore, it is prayed that the Board redetermine the correct amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, viz, \$86,937.47 plus any and all additional amounts which may result from the correction of any error made by the Commissioner. The Commissioner hereby makes claim for the increased deficiency resulting from such redetermination.

(Signed) HERMAN OLIPHANT,  
Herman Oliphant

*General Counsel for the Department of the Treasury,  
Attorney for Respondent.*

Of Counsel:

F. R. SHEARER,

E. L. UPDIKE,

*Special Attorneys for the  
Bureau of Internal Revenue.*

Before United States Board of Tax Appeals

Docket No. 84639

[Same Title]

*Reply*

Filed Sept. 3, 1936

The petitioner, by her attorney, Ralph M. Andrews, in reply to respondent's answer herein, admits and denies the affirmative allegations thereof as follows:

4 X. Admits that the deduction allowable to petitioner on account of contributions during the calendar year 1933 should be computed in accordance with the provisions of paragraph 23 (n) of the Revenue Act of 1932. Denies each and every other allegation contained in paragraph "4 X" of respondent's answer.

5 I (e). Admits that the Commissioner of Internal Revenue has included an amount of \$1,145.34 in petitioner's gross income for the calendar year 1933 as dividends received from F. W. Woolworth & Co., Ltd.

5 V (gg). Denies that the \$10,000 face amount of corporate stock of the City of New York issued for water supply purposes, 4's of 1959, referred to in paragraph 5 V (gg) of respondent's answer, had a fair market value of \$7,900 on July 1, 1921 and alleges that said stock had a fair market value on said date of not less than \$8,025.

5 V (11). Denies that the \$10,000 face amount of corporate stock of the City of New York issued for water supply purposes, 4's of 1959, referred to in paragraph "5 V (11)" of the respondent's answer had a fair market value of July 1, 1921 of only \$7,900 and alleges that said corporate stock had a value of not less than \$8,025 on said date. Denies all other allegations contained in said paragraph.

6. (a). Denies all of the allegations contained in paragraph "6 (a)" of respondent's answer.

6 (b). Denies that the fair market values of all the securities owned by petitioner's father on the date of his death were less than the amounts used as bases by the Commissioner in making his determination and less than the respective bases claimed by the petitioner in this proceeding.

6 (c). Denies all of the allegations contained in paragraph "6 (c)" of respondent's answer.

6 (d). Denies all of the allegations contained in paragraph "6 (d)" of respondent's answer.

Denies generally and specifically each and every allegation contained in respondent's answer not hereinbefore admitted, qualified, or denied.

Wherefore, petitioner prays that the Board may hear this proceeding and determine that the respondent erred in the respects stated in paragraph "4" of the petition, that the claims for an additional deficiency made in respondent's answer are without merit and should be denied and that petitioner is entitled to the relief prayed for in paragraph "6" of the petition.

(S) RALPH M. ANDREWS,

*Counsel for Petitioner,*

*Office and Post Office Address, 1330 Main Trust Bldg.,*

*239 Main Street, Buffalo, New York.*

66 [Duly sworn to by Marjorie K. Campbell; jurat omitted in printing.]

67

Before United States Board of Tax Appeals

Docket No. 84039

[Same title.]

*Amended petition*

Filed at Hearing, Dec. 14, 1938

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency dated February 27,

1936 (IT:AR:A-2 MEW:90D), and as a basis of her proceeding alleges as follows:

1. At all the times hereinafter mentioned petitioner was and still is a resident of the Village of East Aurora, County of Erie and State of New York.

2. The notice of deficiency (a copy of which is attached hereto marked "Exhibit A") was mailed to the petitioner on February 27, 1936.

3. The tax in controversy is an income tax for the calendar year 1933, and amounts to the sum of \$86,937.47.

4. The determination of tax set forth in said deficiency letter is based upon the following errors:

### I

The disallowance by the Commisisoner of Internal Revenue of a credit of \$381.78 against petitioner's income tax on account of British income taxes withheld from dividends paid petitioner by an incorporated English company.

### II

The determination by the Commissioner of Internal Revenue that a dividend of \$672.00 received by petitioner from the Great Southern Lumber Company is taxable to petitioner to the extent of 83.6544% thereof.

### III

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain shares of the common stock of United States Steel Corporation and American Telephone & Telegraph Company, and of certain bonds of the Federal Land Banks of Louisville and Columbia, which petitioner had acquired from her father's testamentary trustees, and which had theretofore been purchased by said trustees, was the cost of said securities to said trustees.

### IV

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain shares of the capital stock of The Atchison, Topeka & Santa Fe Railway Company, which petitioner had acquired from her father's testamentary trustees, was as follows:

i. As to so much thereof as was purchased by her father  
69 prior to his death, the fair market value of said securities  
on the date of their transfer by her father's executors to  
her father's testamentary trustees.

ii. As to so much thereof as was purchased by her father's  
testamentary trustees, the cost thereof to said trustees.

## V

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain corporate stock of the City of New York issued for water supply purposes (4's of 1959) and of certain shares of the capital stock of Southern Pacific Railroad Company, Hotels Statler Company, Inc., and Union Pacific Railroad Company, which petitioner had acquired from her father's testamentary trustees, and which had been purchased by her father prior to his death, was the fair market value of said securities on the date of the transfer thereof by her father's executors to her father's testamentary trustees.

## VI

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain bonds of the City of Philadelphia, Pennsylvania, and on the maturity during said year of certain bonds of the Cities of Auburn and Rochester, New York, which petitioner had acquired from her father's testamentary trustees, and which had theretofore been purchased by her father's executors, was the fair market value of said securities on the date of the transfer thereof by her father's executors to her father's testamentary trustees.

## VII

The determination by the Commissioner of Internal Revenue that, for the purpose of determining gain or loss, petitioner's cost basis on the sale during the calendar year 1933 of certain shares of the \$25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation which petitioner had acquired from her father's testamentary trustees, and of certain shares of the common stock and warrants of Niagara Hudson Power Corporation which were derived from stock which petitioner had acquired from her father's testamentary trustees, was as follows:

i. As to so much thereof as was purchased by her father's executors, the cost thereof to said executors.

ii. As to so much thereof as was purchased by her father's testamentary trustees, the cost thereof to said trustees.

### VIII

The determination by the Commissioner of Internal Revenue that on petitioner's sale during the calendar year 1933 of 10,000 shares of the capital stock of F. W. Woolworth Company, petitioner derived a capital gain of \$318,128.92 instead of sustaining a capital loss of \$278,854.33, upon the grounds:

i. That in the application of the "first-in—first-out" rule, the order of acquisition should be determined by employing the dates as of which petitioner's cost basis is ascertained rather than the dates on which petitioner physically acquired the securities; and that for the purpose of applying said rule all of the stock sold must be deemed to be out of lots acquired by petitioner from her father's testamentary trustees; and

ii. That petitioner's cost basis in stock distributed to her by her father's testamentary trustees, and which had theretofore been purchased by her father prior to his death, is the fair-market value of said stock on July 1, 1921, the date of the transfer thereof by her father's executors to her father's testamentary trustees.

### IX

The disallowance by the Commissioner of Internal Revenue of an ordinary loss of \$5,250.00 sustained by petitioner on the sale during the calendar year 1933 of \$50,000.00 face amount of New York City corporate stock (4½'s of 1957), upon the ground that petitioner acquired substantially identical securities in the same amount within thirty days before or after said sale.

5. The facts upon which petitioner relies as the basis of this proceeding are as follows:

### I

(a) Throughout the year 1933 petitioner was the owner, among other things, of certain shares of stock of F. W. Woolworth & Co., Ltd., a British incorporated company.

(b) On various dates during said year 1933 there became payable to petitioner, dividends in respect of her said shares in said F. W. Woolworth & Co., Ltd., in the aggregate amount of \$1,527.12.

(c) Upon information and belief, said dividends were subject to a British income tax under the English law, and the payor company, in each case, is required to withhold from the dividends paid the amount of said tax. The amount of said

tax withheld on petitioner's dividends from the above source was \$381.78 in American funds.

(d) In her income tax return for the calendar year 1933, filed with the Collector of Internal Revenue at Buffalo, New York, on or about March 15, 1934, petitioner included in gross income the gross dividend payable to her of \$1,527.12, and inserted in item 38 of her said return for that year the amount of \$381.78, the tax withheld.

(e) Respondent, in his deficiency letter, among other things, while allowing a deduction from gross income on account of said foreign tax of \$381.78, has failed to allow any part of said amount as a credit against petitioner's alleged deficiency.

## II

(f) On July 1, 1933, and for some time prior thereto petitioner was the owner of 224 shares of the capital stock of Great Southern Lumber Company, a Pennsylvania corporation with its principal office in the City of Harrisburg, Pennsylvania.

(g) Said Great Southern Lumber Company, in the year 1933, and for many years prior thereto, was the owner of a large quantity of long leaf yellow pine timber situated in the northern part of the State of Louisiana, and owned and operated a saw-  
73 mill in the City of Bogalusa, Louisiana. In the year 1933 the corporation's land, to a very large extent, had been cut over and stripped of its stand, and in that year the corporation was approaching the end of its timber operation. During said year and for several years prior thereto the corporation had taken steps toward gradual liquidation.

(h) Prior to January 21, 1933, the Great Southern Lumber Company had an authorized issue of capital stock consisting of 160,000 shares of the par value of \$80.00 each, all of which said shares were common stock and amounted in the aggregate to \$12,800,000.00.

(i) At a meeting of the board of directors of the Great Southern Lumber Company held January 21, 1933, a meeting of the stockholders of said corporation was called to be held on April 26, 1933, for the purpose of voting upon a proposition for a reduction of the capital stock of said corporation from \$12,800,000.00 to \$12,320,000.00, to be effected by a reduction of the par value of the corporation's shares from \$80.00 to \$77.00 per share. Said meeting of the stockholders was duly held on April 26, 1933, and the following resolutions were duly adopted: "Resolved, That the capital of Great Southern Lumber Company be authorized to be reduced from \$12,800,000.00 to \$12,-

320,000.00, the same to be effected by a reduction in the par value of shares;

"Resolved, That the actual reduction in the said corporation's capital stock shall be made by its Board of Directors at such time as the said Board, in its discretion, shall determine."

\* \* \* \* \*

74 "Resolved, That the par value of shares of capital stock of Great Southern Lumber Company be, and the same are, hereby authorized to be reduced from \$80.00 per share to \$77.00 per share, so that the capital stock of the company thereafter shall consist of 160,000 shares with a par value of \$77.00 aggregating, at par, \$12,320,000.00;

"Resolved, That the actual reduction in the par value of said shares of said corporation shall be made by its Board of Directors at such time as the said board, in its discretion, shall determine."

(j) The Judges' Returns of Election to reduce the capital stock and to change the par value of the corporation's shares were thereafter duly filed in the office of the Secretary of the Commonwealth of Pennsylvania.

(k) At a meeting of the board of directors of said Great Southern Lumber Company held on June 27, 1933, the following resolution was duly adopted:

"Resolved: That the capital stock of this Company be, and the same is hereby actually reduced from \$12,800,000.00 to \$12,320,000.00;

"Resolved: That the par value of shares of capital stock of this company be, and the same is hereby reduced from \$80.00 per share to \$77.00 per share."

(l) Thereafter, and in accordance with statutory proceedings for the reduction of capital stock and the reduction of par value of its shares, and as required by the laws of Pennsylvania, 75 said Great Southern Lumber Company duly paid to its stockholders of record the sum of \$3.00 per share, charging said distribution to its capital stock account, and reducing its authorized and outstanding issue of capital stock accordingly. The par value of each certificate of outstanding capital stock of the corporation was changed from \$80.00 per share to \$77.00 per share.

(m) Petitioner duly deposited certificates representing said 224 shares of the capital stock of said Great Southern Lumber Company, and on July 1, 1933, a partial liquidating dividend of \$672.00 was duly paid to petitioner.

(n) Thereupon there were returned to petitioner certificates representing said 224 shares, having a par value of \$77.00 per

share. Petitioner credited the entire amount of said distribution to her personal capital account.

(o) The amount distributed by said Great Southern Lumber Company to petitioner, as aforesaid, was less than the fair market value of said stock on July 10, 1928, the date on which said stock was distributed to petitioner by her father's testamentary trustees, and was less than the fair market value of said stock on July 1, 1921, the date on which said stock was transferred of record and delivered by her father's executors to his testamentary trustees, as adjusted on account of intervening distributions from capital, and petitioner did not include any part of the amount so received in her taxable net income for the year 1933.

(p) The Commissioner of Internal Revenue, in his final determination, has included in petitioner's taxable net income an amount of \$562.16 of the total distribution of \$672.00  
76 from said Great Southern Lumber Company, above described, upon the ground that 83.6544% of said distribution to petitioner was taxable to her.

### III

(q) Petitioner's father, Seymour H. Knox, died on May 16, 1915, leaving a last will and testament, by the provisions of which the testator, after directing payment of his debts and the making of certain specific bequests, provided, in part, as follows, with respect to the disposition of his residuary estate:

"(D) Twenty (20) per cent of all the rest, residue, and remainder of my said estate (not including, however, the shares of capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first) I give, devise and bequeath to my brother, Henry D. Knox, and Walter P. Cooke, both of the City of Buffalo, in trust nevertheless, for the following uses and purposes, to wit:

"To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my said trustees shall seem wise and proper toward the support, maintenance and education of my daughter, Marjorie Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over the accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said

77 daughter, Marjorie Knox, until she shall arrive at the age of twenty-eight (28) years, at which time, I give, devise and bequeath to my said daughter, Marjorie Knox, one-half ( $\frac{1}{2}$ ) of the property then constituting said trust fund and I direct my said trustees to pay over the net income on the remaining one-half ( $\frac{1}{2}$ ) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise and bequeath the remaining part of said trust fund to my said daughter, Marjorie Knox, and to her heirs and assigns forever.

"In the event that my said daughter, Marjorie Knox, shall die before reaching the age of thirty-five (35) years, I give, devise and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Marjorie Knox, if any, surviving her; to be divided among them, share and share alike. And in case there be no issue her surviving, then I give, devise and bequeath said trust fund unto her heirs."

(r) Pursuant to authority vested in them by the provisions of petitioner's father's will quoted above at paragraph III (q), said testamentary trustees bought the following securities on or about the dates and for the amounts hereinafter stated:

Date	Quantity	Security	Amount
Dec. 31, 1925	600 shares common.....	United States Steel Corporation.....	\$80,287.50
Dec. 31, 1925	150 shares.....	American Telephone & Telegraph Company.	21,343.75
78 July 31, 1926	25 shares.....	American Telephone & Telegraph Company.	2,568.75
May 31, 1923	\$25,000.00 face amount.....	Federal Land Bank bonds (Louisville) (4 $\frac{1}{4}$ 's of 1953/33).	25,125.00
May 31, 1925	\$8,000.00 face amount.....	Federal Land Bank bonds (Columbia) (4 $\frac{1}{4}$ 's of 1955/35).	8,220.00

(s) On or about June 1, 1928, said testamentary trustees of petitioner's father's estate received, with respect to said 175 shares of the stock of American Telephone & Telegraph Company, one warrant for each share held. Said warrants entitled the holder thereof to acquire one new share of the stock of said American Telephone & Telegraph Company at \$100.00 per share for each six warrants held.

(t) On or about June 1, 1927, said testamentary trustees received a 40% stock dividend with respect to said 600 shares of the common stock of United States Steel Corporation, increasing their holdings therein to 840 shares.

(u) On or about July 10, 1928, said testamentary trustees distributed to petitioner, among other things, the following securi-

ties which have been heretofore referred to, and which, on said date, had a fair market value as hereinafter stated:

Quantity	Security	Unit price	Value
840 shares common.....	United States Steel Corporation.....	\$139.50	\$117,180.00
175 shares.....	American Telephone & Telegraph Company.....	176.5625	30,898.44
79 175 warrants.....	American Telephone & Telegraph Company.....	12.125	2,121.88
\$25,000.00 face amount.....	Federal Land Bank bonds (Louisville) (4½'s of 1953/33).....	100.125	25,031.25
\$8,000.00 face amount.....	Federal Land Bank bonds (Columbia) (4½'s of 1955/35).....	100.25	8,020.00

(v) On or about July 25, 1928, petitioner exercised the rights which she had received from said testamentary trustees, and upon the exercise thereof acquired 29 additional shares of the capital stock of said American Telephone & Telegraph Company at an expenditure of \$2,998.60.

(w) During the calendar year 1933 petitioner duly sold the above-described securities on the dates and in the amounts hereinafter stated:

Date	Quantity	Security	Sale price
Dec. 1, 1933	840 shares common.....	United States Steel Corporation.....	\$36,896.66
Dec. 20, 1933	204 shares.....	American Telephone & Telegraph Company.....	22,465.15
Dec. 21, 1933	\$25,000.00 face amount.....	Federal Land Bank bonds (Louisville) (4½'s of 1953/33).....	20,593.75
Dec. 27, 1933	\$8,000.00 face amount.....	Federal Land Bank bonds (Columbia) (4½'s of 1955/35).....	6,630.00

80 (x) In her return for the calendar year 1933 petitioner reported capital losses on the sales of the above securities in the following amounts, and computed as follows:

Quantity	Security	Fair market value July 10, 1928	Sale price	Capital loss
840 shares common.....	United States Steel Corporation.....	\$117,180.00	\$36,896.66	\$80,283.34
204 shares.....	American Telephone & Telegraph Company.....			
Value of:				
175 shares..... \$31,062.50				
175 warrants..... 2,143.80				
Purchase price of 29 shares... 2,900.00				
\$25,000.00 face amount.....	Federal Land Bank bonds (Louisville) (4½'s of 1953/33).....	36,106.10	22,465.15	13,640.95
\$8,000.00 face amount.....	Federal Land Bank bonds (Columbia) (4½'s of 1955/35).....	25,031.25	20,593.75	4,437.50
		8,020.00	6,630.00	1,390.00

(y) The Commissioner of Internal Revenue, in his final determination, has reduced petitioner's cost basis in the above

described securities, and has reduced the capital losses claimed by petitioner on the sales thereof in the following amounts:

81	United States Steel Corporation.....	\$36,892.50
	American Telephone & Telegraph Company.....	9,293.60
	Federal Land Bank bonds (Louisville).....	605.63
	Federal Land Bank bonds (Columbia).....	204.00

The Commissioner of Internal Revenue has made said reductions upon the ground that petitioner's cost basis in the above securities is the cost thereof to her father's testamentary trustees, and in determining the said trustees' cost of the Federal Land Bank bonds of Louisville and Columbia has employed said trustees' average cost in those and certain other bonds.

#### IV

(z) On the date of the death of petitioner's father, May 16, 1915, the latter was the owner of 500 shares of the common capital stock of The Atchison, Topeka & Santa Fe Railway Company, which had a fair market value on that date of and was appraised at \$49,625.00.

(a) Pursuant to the provisions of petitioner's father's will above quoted at paragraph III (q), 20% of said shares of stock of The Atchison, Topeka & Santa Fe Railway Company, or 100 shares, was transferred of record and delivered by the executors to the testamentary trustees for petitioner on July 1, 1921. Said stock had a fair market value on that date of \$80.50 per share, or a total value of \$8,050.00.

(bb) Thereafter and on April 30, 1928, said testamentary trustees purchased 4 additional shares of said stock for \$400.00.

82 (cc) Upon petitioner's attaining the age of 28 years on July 10, 1928, said testamentary trustees distributed said 104 shares of stock of The Atchison, Topeka & Santa Fe Railway Company to petitioner. On that date said shares had a fair market value of \$188.50 per share, or a total value of \$19,604.00.

(dd) On December 20, 1933, petitioner duly sold said 104 shares, receiving therefor \$5,509.94.

(ee) In her return for the calendar year 1933 petitioner claimed a capital loss of \$14,237.06 on the sale of said 104 shares of stock of The Atchison, Topeka & Santa Fe Railway Company.

(ff) The Commissioner of Internal Revenue, in his final determination has determined that the petitioner's loss on said sale was \$2,940.06, being the difference between the fair market value of 100 of said shares on the date they were transferred of record and delivered to said testamentary trustees by said executors, plus the

trustees' cost of the 4 shares purchased by them in 1928, and the sale price thereof.

## V

(gg) On July 1, 1921, the executors of petitioner's father's estate transferred of record and delivered to the testamentary trustees for petitioner, the following securities which on that date, had a fair market value as follows:

83	Quantity	Security	Unit price	Value
	\$10,000.00 face amount....	City of New York corporate stock issued for water supply purposes (4's of 1959).....	\$96.50	\$9,650.00
	125 shares .....	Southern Pacific Railroad Company .....	74.375	9,296.88
	160 shares .....	Hotels Statler Company, Inc. ....	75.00	12,000.00
	100 shares .....	Union Pacific Railroad Company .....	117.875	11,787.50

(hh) Upon petitioner's attaining the age of 28 years on July 10, 1928, the above described securities were distributed to her by her father's testamentary trustees. On that date said securities had fair market values as follows:

	Quantity	Security	Unit price	Value
	\$10,000.00 face amount....	City of New York corporate stock issued for water supply purposes (4's of 1959).....	\$99.25	\$9,925.00
	125 shares .....	Southern Pacific Railroad Company .....	120.25	15,031.25
	160 shares .....	Hotels Statler Company, Inc. ....	125.00	20,000.00
	100 shares .....	Union Pacific Railroad Company .....	194.9375	19,493.75

84 (ii) Thereafter and on December 28, 1929, a 100% stock dividend of 160 shares was declared and received by petitioner on her holdings of the stock of Hotels Statler Company, Inc., bringing her total holdings of said stock to 320 shares.

(jj) Thereafter petitioner sold the above described securities on the dates and for the amounts following:

Date	Quantity	Security	Sale price
Dec. 21, 1933	\$10,000.00 face amount....	City of New York corporate stock issued for water supply purposes (4's of 1959).....	\$7,537.50
Dec. 20, 1933	125 shares .....	Southern Pacific Railroad Company .....	2,381.87
Dec. 26, 1933	320 shares .....	Hotels Statler Company, Inc. ....	2,833.60
Dec. 20, 1933	100 shares .....	Union Pacific Railroad Company .....	11,191.00

(kk) In her return for the calendar year 1933 petitioner claimed capital losses on the above sales as follows:

City of New York corporate stock issued for water supply purposes (4's of 1959).....	\$2,106.25
Southern Pacific Railroad Company .....	12,800.38
Hotels Statler Company, Inc. ....	13,168.40
Union Pacific Railroad Company .....	8,309.00

85 (ll) The Commissioner of Internal Revenue, in his final determination, has determined that petitioner's capital losses on the sales of the above securities should be the difference between their fair market values on July 1, 1921, the date on which said securities were transferred of record and delivered by petitioner's father's executors to his testamentary trustees, and the sale prices thereof, and has reduced said losses by the following amounts:

City of New York corporate stock issued for water supply purposes (4's of 1959)-----	\$293. 75
Southern Pacific Railroad Company-----	5, 984. 37
Hotels Statler Company, Inc.-----	4, 000. 00
Union Pacific Railroad Company-----	7, 712. 50

## VI

(mm) On July 1, 1921, the executors of the estate of petitioner's father transferred of record and delivered to the testamentary trustees for petitioner, pursuant to the provisions of the will above quoted at paragraph III (q), \$50,000.00 face amount of the bonds of the City of Philadelphia (4's of 1946), \$10,000.00 face amount of the bonds of the City of Auburn, New York (4¾'s of 1933), and \$20,000.00 face amount of the bonds of the City of Rochester, New York (4½'s of 1933).

(nn) Upon information and belief, the Commissioner of Internal Revenue has determined the fair market value of said City of Philadelphia bonds on the date of said transfer to be \$50,687.50, of said City of Auburn bonds to be \$10,227.83, and of said City of Rochester bonds to be \$20,082.50.

86 (oo) When petitioner attained the age of 28 years on July 18, 1928, said testamentary trustees distributed the above described bonds to petitioner. On that date said bonds of the City of Philadelphia had a fair market value of \$99.81876 per \$100.00, or an aggregate fair market value of \$49,909.38. On that date said bonds of the City of Auburn had a fair market value of \$102.4375 per \$100.00, or an aggregate fair market value of \$10,243.75, and on said date said bonds of the City of Rochester had a fair market value of \$101.85705 per \$100.00, or an aggregate fair market value of \$20,371.41.

(pp) On or about November 10, 1933, petitioner duly sold said bonds of the City of Philadelphia (4's of 1946) for \$42,930.41.

(qq) During said year 1933 all of said bonds of the cities of Auburn and Rochester matured, petitioner receiving on the redemption thereof \$10,000.00 for the City of Auburn bonds and \$20,000.00 for the City of Rochester bonds.

(rr) In her return for the calendar year 1933, petitioner claimed a capital loss on the sale of said City of Philadelphia bonds (4's of 1946) of \$11,259.59, and capital losses on the maturity of the City of Auburn and City of Rochester bonds of \$227.83 and \$548.00, respectively, said claimed losses being the difference between the claimed fair market values of said securities on the date on which they were distributed to petitioner by the said testamentary trustees and the amounts received therefor by the petitioner on her disposition thereof during the calendar year 1933.

87 (ss) The Commissioner of Internal Revenue, in his final determination, has reduced the capital loss claimed by petitioner on the sale of the City of Philadelphia bonds to \$757.09, has held that the loss of \$227.83 claimed by petitioner on the maturity of the City of Auburn bonds was an ordinary and not a capital loss, and that petitioner's loss on the maturity of the City of Rochester bonds should be reduced to \$82.50 and constituted an ordinary loss instead of a capital loss.

## VII

(tt) On June 15, 1925, the executors of the estate of petitioner's father transferred of record and delivered to the testamentary trustees for petitioner, pursuant to the provisions of the will above quoted at paragraph III (q), 214 shares of the common capital stock of Niagara, Lockport & Ontario Power Company, which had theretofore cost said executors \$4,537.06. Said 214 shares had a fair market value on said June 15, 1925, of \$76.00 per share, or an aggregate value of \$16,264.00.

(uu) Thereafter and on or about August 1, 1925, said testamentary trustees exchanged said 214 shares of Niagara, Lockport & Ontario Power Company common stock for 267½ shares of the \$25.00 par value preferred stock (sometimes referred to as \$1.60 preferred stock) and 267½ shares of the common stock of Buffalo, Niagara & Eastern Power Corporation, said exchange being pursuant to a plan of reorganization to which both said Niagara, Lockport & Ontario Power Company and Buffalo, Niagara & Eastern Power Corporation were parties. On the date of said exchange the fair market value of said common stock of Buffalo, Niagara & Eastern Power Corporation was \$42.375 per share and of the preferred stock of said corporation was \$24.375 per share.

88 (vv) Thereafter and on August 31, 1925, said testamentary trustees purchased for \$1,202.50, 32½ additional shares of the common stock of said Buffalo, Niagara & Eastern

Power Corporation, bringing their total holdings of said common stock to 300 shares.

(ww) On the same date said testamentary trustees purchased 32½ shares of the \$25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation, paying therefor \$780.25.

(xx) Subsequently and on or about January 3, 1926, said testamentary trustees purchased 75 shares of the Class "A" common stock of said Buffalo, Niagara & Eastern Power Corporation, paying therefor \$1,500.00.

(yy) Thereafter and on July 10, 1928, the date on which petitioner attained the age of 28 years, said testamentary trustees distributed to her said 300 shares of the \$25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation, which, on that date, had a fair market value of \$26.25 per share, or an aggregate fair market value of \$7,875.00, said 300 shares of the common stock of Buffalo, Niagara & Eastern Power Corporation, which, on that date, had a fair market value of \$40.25 per share, or an aggregate fair market value of \$12,075.00, and said 75 shares of the Class "A" common stock of Buffalo, Niagara & Eastern Power Corporation, which, on that date had a fair market value of \$37.50 per share, or a total fair market value of \$2,812.50.

(zz) Thereafter and on or about August 19, 1929, petitioner exchanged said 300 shares of the common stock of Buffalo, 89 Niagara & Eastern Power Corporation for 1,200 shares of the common stock of Niagara Hudson Power Corporation and 300 Class "A" option warrants of said Niagara Hudson Power Corporation, which warrants entitled the holder to purchase at any time on or before October 1, 1944, one share of the corporation's common stock at \$35.00 per share for each warrant held.

(aaa) On the same date (August 19, 1929) the petitioner exchanged said 75 shares of the Class "A" common stock of Buffalo, Niagara & Eastern Power Corporation for 300 shares of the common stock of Niagara Hudson Power Corporation and 75 Class "A" option warrants of said Niagara Hudson Power Corporation, which warrants entitled the holder to purchase at any time on or before October 1, 1944, one share of the corporation's common stock at \$35.00 per share for each warrant held.

(bbb) On said date (August 19, 1929) common stock of said Niagara Hudson Power Corporation had a fair market value of \$26.75 per share, and the Class "A" option warrants had a fair market value on that date of \$9.00 each. Said exchange was pursuant to a plan of reorganization to which both said Buffalo,

Niagara & Eastern Power Corporation and said Niagara Hudson Power Corporation were parties.

(ccc) Thereafter and on August 8, 1932, pursuant to corporate action taken by the corporation to reduce its capital stock from 45,000,000 shares of the par value of \$10.00 each to 15,000,000 shares of the par value of \$15.00 each, petitioner exchanged her 1,500 shares of old common stock of said Niagara Hudson Power

Corporation, having a par value of \$10.00 each, for 500 new shares of common stock of said corporation, having a par value of \$15.00 each, reducing her holdings of such common stock to 500 shares. A corresponding reduction was accomplished in the number of outstanding Class "A" option warrants, by a similar exchange of one for three, petitioner's holdings thereof being reduced to 125 warrants.

(ddd) Subsequently and on December 20, 1933, petitioner duly sold said 500 shares of the common stock of Niagara Hudson Power Corporation for \$2,506.75, said 125 Class "A" option warrants of said corporation for \$40.24, and said 300 shares of the \$25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation for \$4,800.50.

(eee) In her return for the calendar year 1933 which was filed on or about March 15, 1934, with the Collector of Internal Revenue at Buffalo, New York, petitioner reported capital losses on account of the sale of said 500 shares of Niagara Hudson Power Corporation common stock and said 125 Class "A" option warrants of said corporation of \$12,340.51, and on the sale of said 300 shares of \$25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation of \$3,037.00.

(fff) The Commissioner of Internal Revenue, in his final determination, has reduced the capital loss claimed by petitioner on the sale of said 500 shares of common stock and 125 Class "A" option warrants of Niagara Hudson Power Corporation to \$3,035.78, and has disallowed the loss claimed by petitioner on the sale of said 300 shares of \$25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation and has determined a capital gain thereon of \$2,363.46. In determining the adjusted loss on the Niagara Hudson Power Corporation common stock and the Class "A" option warrants of said corporation, the Commissioner of Internal Revenue has used that part of the cost to the executors of petitioner's father's estate of said 214 shares of Niagara, Lockport & Ontario Power Company common stock which is allocable to the 267½ shares of common stock of Buffalo, Niagara & Eastern Power Corporation received by the testamentary trustees on the exchange of August 1, 1925, plus the said trustees' cost of the

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32½ additional shares of common stock of Buffalo, Niagara & Eastern Power Corporation purchased by them on August 31, 1925, plus the said trustees' cost of the 75 shares of Class "A" common stock of Buffalo, Niagara & Eastern Power Corporation purchased by them on January 31, 1928, or an aggregate adjusted cost basis of \$5,582.77.

(ggg) In determining a gain on the sale of the said preferred stock of Buffalo, Niagara & Eastern Power Corporation, the Commissioner of Internal Revenue has used as the cost basis that part of the said executors' cost of the 214 shares of common stock of Niagara, Lockport & Ontario Power Company which is allocable to the 267½ shares of said preferred stock of Buffalo, Niagara & Eastern Power Corporation received by said testamentary trustees on the exchange of August 1, 1925, plus the cost to said trustees of the 32½ shares of Buffalo, Niagara & Eastern Power Corporation preferred stock purchased by them on August 31, 1925, or an aggregate adjusted cost basis of \$2,437.04.

### VIII

(hhh) On July 1, 1921, petitioner's father's executors transferred of record and delivered to the testamentary trustees for petitioner, in accordance with the terms of the will above quoted at paragraph III (q), 4,964 shares of the stock of F. W. Woolworth Company, having a par value of \$100.00 per share, which, on that date, had a fair market value of \$110.00 per share, or an aggregate fair market value of \$546,040.00.

(iii) Subsequently and on or about June 30, 1924, said trustees, pursuant to proper corporate action by which the par value of the shares of stock of said F. W. Woolworth Company was reduced from \$100.00 each to \$25.00 each, exchanged said 4,964 shares of the \$100.00 par value F. W. Woolworth Company stock for 19,856 shares of the \$25.00 par value F. W. Woolworth Company stock.

(jjj) On or about January 31, 1925, said testamentary trustees purchased for \$16,344.00 in cash, 144 additional shares of the stock of said F. W. Woolworth Company, having a par value of \$25.00 each, out of which 125 shares were sold on December 31, 1925, at a profit. Out of the lot of 19,856 shares of said stock acquired on the exchange of June 30, 1924, said trustees, on December 31, 1925, sold 125 shares at a profit. On January 31, 1926, said trustees purchased 250 additional shares of said stock for \$50,925.00.

(kkk) On February 1, 1927, said F. W. Woolworth Company declared a 50% stock dividend, the said trustees receiving thereon

10,000 shares, bringing their total holdings of said stock to 30,000 shares.

(lll) Upon petitioner's attaining the age of 28 years on July 10, 1928, said trustees duly distributed to her one-half of 93 their holdings of said F. W. Woolworth Company stock, namely, 15,000 shares, of the par value of \$25.00 each, which on that date, had a fair market value of \$183.125 per share, or a total fair market value of \$2,746,875.00.

(mmm) On various dates in 1926 and 1927 petitioner purchased individually 1,000 shares of said F. W. Woolworth Company stock, having a par value of \$25.00 each, for \$118,691.58.

(nnn) Thereafter and on June 24, 1929, after proper corporate action further reducing the par value of the corporation's shares from \$25.00 each to \$10.00 each, petitioner exchanged, on the basis of two and one-half for one, the block of 1,000 shares of said F. W. Woolworth Company stock which she had purchased individually and the block of 15,000 shares of said stock which she had acquired from her father's testamentary trustees, receiving in lieu thereof in stock having a par value of \$10.00 per share, 2,500 shares and 37,500 shares, respectively.

(ooo) On various dates in December 1933, petitioner duly sold all of said 2,500 shares, which represented her individual purchases of said F. W. Woolworth Company stock for \$99,051.03, and from the lot of 37,500 shares of said stock acquired from her father's testamentary trustees she sold 7,500 shares for \$292,411.22.

(ppp) In her return for the calendar year 1933 petitioner claimed a capital loss on the sale of said stock of \$278,854.33, being the difference between the aggregate of petitioner's cost of the stock which she had purchased individually in 1926 and 1927 and the claimed fair market value of so much of said stock which she had acquired from said 94 testamentary trustees on the date of the distribution thereof to her, and the sale price thereof.

(qqq) The Commissioner of Internal Revenue, in his final determination, has disallowed said capital loss on the sale of said F. W. Woolworth Company stock and has determined a capital gain of \$318,128.92, upon the ground that, as a result of the exchange on the basis of two and one-half for one, which occurred on June 24, 1929, the identity of petitioner's shares of stock of F. W. Woolworth Company was lost, that the "first-in-first-out" rule must be applied, and, therefore, that the 10,000 shares sold in December 1933, must be deemed to have been out of the lot of 37,500 shares of said stock which petitioner acquired from said testamentary trustees on July 10, 1928, and that petitioner's cost basis therein is the fair market value of said shares

on the date of the transfer thereof by the executors of petitioner's father's estate to said testamentary trustees.

### IX

(rrr) On or about December 29, 1932, petitioner purchased \$25,000.00 face amount of the corporate stock of the City of New York (4½'s issued May 1, 1907, interest payable on May 1 and November 1 of each year, maturity on May 1, 1957), paying therefor \$23,500.00. On the same date petitioner purchased \$25,000.00 face amount of the corporate stock of the City of New York (4½'s issued November 1, 1908, interest payable on May 1 and November 1 of each year, maturity on November 1, 1957), paying therefor \$23,500.00. Both lots of bonds were registered securities.

(sss) Thereafter and on or about December 22, 1933, petitioner duly sold said \$25,000.00 face amount of said 95 bonds maturing May 1, 1957, for \$20,875.00, and said \$25,000.00 face amount of said bonds maturing November 1, 1957, for \$20,875.00.

(ttt) On December 23, 1933, petitioner purchased \$10,000.00 face amount of the corporate stock of the City of New York (4½'s issued May 1, 1907, interest payable on May 1 and November 1 of each year, maturity on May 1, 1957), paying therefor \$8,512.50. On the same date petitioner purchased \$50,000.00 face amount of the corporate stock of the City of New York (4½'s issued March 1, 1913, interest payable on March 1 and September 1 of each year, maturity on March 1, 1963), paying therefor \$41,875.00. The bonds purchased as stated in this paragraph were coupon bonds.

(uuu) In her income tax return for the calendar year 1933 petitioner claimed \$5,250.00 as ordinary losses sustained on the sales mentioned in paragraph IX (sss) hereof.

(vvv) The Commissioner of Internal Revenue, in his final determination, has disallowed all of said loss, upon the ground that petitioner acquired substantially identical securities in the same amount within thirty days before or after said sale.

6. Wherefore, petitioner prays that this Board may hear the proceeding and determine that:

### I

Petitioner is entitled to a credit of \$381.78 against her 1933 income tax on account of British income taxes withheld at the source by the payor foreign corporation on dividends received by petitioner therefrom.

## II

The distribution of Great Southern Lumber Company received by petitioner during the calendar year 1933 was a partial liquidating dividend of said Great Southern Lumber Company, properly chargeable to the corporation's capital stock account, and was not a distribution of earnings or profits taxable to petitioner under the provisions of the Revenue Act of 1932.

## III

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain shares of the common stocks of United States Steel Corporation and American Telephone & Telegraph Company, and of certain bonds of the Federal Land Banks of Louisville and Columbia, petitioner's cost basis is the fair market value of said securities on July 10, 1928, the date on which they were distributed to petitioner by her father's testamentary trustees.

## • IV

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain shares of the capital stock of The Atchison, Topeka & Santa Fe Railway Company, petitioner's cost basis is the fair market value of said securities on July 10, 1928, the date on which they were distributed to petitioner by her father's testamentary trustees.

## V

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain corporate  
97 stock of the City of New York (4s of 1959) and certain shares of the capital stocks of Southern Pacific Railroad Company, Hotels Statler Company, Inc., and Union Pacific Railroad Company, petitioner's cost basis is the fair market value of said securities on July 10, 1928, the date on which they were distributed to petitioner by her father's testamentary trustees.

## VI

For the purpose of determining capital gain or loss on petitioner's sale during the calendar year 1933 of the bonds of the City of Philadelphia, Pennsylvania, and ordinary losses on maturity during the calendar year 1933 of the bonds of the Cities

of Auburn and Rochester, New York, petitioner's cost basis is the fair market value of said bonds on July 10, 1928, the date on which they were distributed to petitioner by her father's testamentary trustees.

## VII

For the purpose of determining gain or loss on petitioner's sale during the calendar year 1933 of certain shares of the \$25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation, and of certain shares of the common stock and warrants of Niagara Hudson Power Corporation, petitioner's cost bases were, respectively, the fair market values as of July 10, 1928, of said \$25.00 par value preferred stock of Buffalo, Niagara & Eastern Power Corporation, and the fair market value on that date of the common and Class "A" common stocks of Buffalo, Niagara & Eastern Power Corporation, from which said Niagara Hudson Power Corporation stock and warrants were derived, and which were distributed on said July 10, 1928, to petitioner by her father's testamentary trustees.

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## VIII

Petitioner sustained a capital loss of \$278,854.33 on the sale during the calendar year 1933 of 10,000 shares of the capital stock of F. W. Woolworth Company, upon the ground:

i. That for the purpose of applying the "first-in—first-out" rule, the dates of acquisitions should be, in the case of the stock purchased by petitioner, the date of such purchase, and in the case of stock acquired by the petitioner from her father's testamentary trustees, the date of distribution to her by said trustees, and, therefore, that petitioner's purchases of said stock prior to July 10, 1928, must be exhausted first; and

ii. That on so much of said stock as was acquired by petitioner from her father's testamentary trustees, petitioner's cost basis is the fair market value thereof on July 10, 1928, the date on which said securities were distributed to her by said trustees.

## IX

Petitioner sustained an ordinary loss of \$4,200.00 on \$40,000.00 face amount (out of a total of \$50,000 face amount) of New York City corporate stock (4½'s of 1957) sold by petitioner during the calendar year 1933; that not in excess of \$10,000.00

face amount of substantially identical securities was purchased within thirty days before or after the date of said sale.

(S) RALPH M. ANDREWS,  
Counsel for Petitioner,  
Office and Post-office Address,  
239 Main Street, Buffalo, New York.

99 [Duly sworn to by Marjorie K. Campbell; jurat omitted in printing.]

100 Before United States Board of Tax Appeals

Docket No. 84639

[Same title]

*Answer to amended petition*

The Commissioner of Internal Revenue by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, for answer to the amended petition filed in the above-entitled appeal, admits, denies and avers as follows:

1. Admits the allegations contained in paragraph 1 of the amended petition.

2. Admits the allegations contained in paragraph 2 of the amended petition.

3. Admits that the tax in controversy is income tax for the calendar year 1933. Denies that the amount in controversy is as alleged in paragraph 3 of the amended petition.

4 I. Admits that the Commissioner disallowed an amount of \$381.78 claimed as a credit on petitioner's income tax return. Denies that the Commissioner thereby erred, and denies all other allegations, if any, contained in subparagraph I of paragraph 4 of the amended petition.

II. Admits that the Commissioner determined that a dividend of \$672.00 received by petitioner from the Great Southern Lumber Company is taxable to the petitioner to the extent of 83.6544% thereof. Denies that the Commissioner thereby erred.

101 III. Admits that the Commissioner determined that petitioner's basis for the purpose of determining gain or loss on the sale during the calendar year 1933 of certain shares of the common stock of United States Steel Corporation and American Telephone & Telegraph Company, and of certain bonds of the Federal Land Banks of Louisville, Kentucky, and Columbus, Ohio, which had theretofore been acquired by the trustees for petitioner's benefit was the cost thereof to the trustees. Denies

that the Commissioner thereby erred, and denies all other allegations contained in subparagraph III of paragraph 4 of the amended petition.

IV, V, VI, & VII. Denies all the allegations contained in subparagraphs IV, V, VI, and VII of paragraph 4 of the amended petition.

VIII. Admits that the Commissioner determined that on petitioner's sale during the calendar year 1933 of 10,000 shares of the capital stock of F. W. Woolworth Company, petitioner realized a capital gain of \$318,128.92 instead of sustaining a capital loss of \$278,854.33. Admits that in determining said capital gain the Commissioner applied the "first in, first out" rule. Denies that the Commissioner thereby erred, and denies all other allegations contained in subparagraph VIII of paragraph 4 of the amended petition.

IX. Admits that the Commissioner disallowed \$5,250.00 claimed by petitioner on her return as an ordinary loss sustained on the sale during the calendar year 1933 of \$50,000.00 face amount of New York City bonds (4½'s of 1957) upon the ground that petitioner acquired substantially identical securities within thirty days before or after said sale. Denies that 102 the Commissioner thereby erred, and denies all other allegations, if any, contained in subparagraph IX of paragraph 4 of the amended petition.

X. In the event it be determined that the Commissioner overstated petitioner's net income for 1933, respondent avers that petitioner's deduction for contributions should be reduced to an amount not exceeding 15% of the net income as redetermined.

5. I (a). Admits all the allegations contained in subparagraph I (a) of paragraph 5 of the amended petition.

I (b). Admits that on various dates during the year 1933 there became payable to the petitioner dividends in respect of her shares of stock of F. W. Woolworth & Co., Ltd. Denies that said dividends amounted in the aggregate to \$1,527.12.

I (c). Denies all the allegations contained in subparagraph I (c) of paragraph 5 of the amended petition.

I (d). Admits that in her income tax return for the calendar year 1933 filed with the Collector of Internal Revenue at Buffalo, New York, on or about March 15, 1934, petitioner included in gross income \$1,527.12 as dividends received on the stock owned by her in F. W. Woolworth & Co., Ltd., and claimed a credit of \$381.78 under item 38 of said return as tax withheld by the British government on said dividends. Denies all other allegations, if any, contained in subparagraph I (d) of paragraph 5 of the amended petition.

I (e). Admits that the Commissioner did not allow any part of the \$381.78 as a credit. Denies all other allegations contained in subparagraph I (e) of paragraph 5 of the amended petition and avers that the Commissioner included only \$1,145.34 in petitioner's gross income as dividends received from F. W. Woolworth & Co. Ltd.

II (f). Admits that on July 1, 1933, and for some time prior thereto, petitioner was the owner of 224 shares of the capital stock of Great Southern Lumber Company. Denies all other allegations contained in subparagraph II (f) of paragraph 5 of the amended petition.

II (g). Admits that in the year 1933, and for many years prior thereto, Great Southern Lumber Company was the owner of a large quantity of long leaf yellow pine timber situated in the northern part of the state of Louisiana, and owned and operated a sawmill in the city of Bogalusa, Louisiana. Denies all other allegations contained in subparagraph II (g) of paragraph 5 of the amended petition.

II (h), (i), (j), & (k). Denies all the allegations contained in subparagraphs II (h), (i), (j), and (k) of paragraph 5 of the amended petition.

II (l). Admits that on or about July 1, 1933, Great Southern Lumber Company paid in cash to the stockholders of record the sum of \$3.00 per share. Denies all other allegations contained in subparagraph II (l) of paragraph 5 of the amended petition.

II (m). Admits that on July 1, 1933, the Great Southern Lumber Company paid \$672.00 to the petitioner. Denies all other allegations contained in subparagraph II (m) of paragraph II (n) of paragraph 5 of the amended petition.

II (n). Denies all the allegations contained in subparagraph 5 of the amended petition.

104 II (o). Admits that the petitioner did not include any part of the amount so received in her taxable net income for the year 1933. Denies all other allegations contained in subparagraph II (o) of paragraph 5 of the amended petition.

II (p). Admits that the Commissioner included in petitioner's taxable net income for 1933 \$562.16 of the total distribution of \$672.00 from the Great Southern Lumber Company upon the ground that 83.6544% of the total was taxable to the petitioner. Denies all other allegations contained in subparagraph II (p) of paragraph 5 of the amended petition.

III (q). Admits that petitioner's father, Seymour H. Knox, died on May 16, 1915, leaving a last will and testament, by which a portion of the estate was devised and bequeathed in trust for

the benefit of the petitioner. Denies all other allegations contained in subparagraph III (q) of paragraph 5 of the amended petition.

III (r). Admits that the trustees of the aforesaid trust purchased the securities on or about the dates and for the amounts set out in subparagraph III (r) of paragraph 5 of the amended petition. Denies all other allegations contained in paragraph 5 III (r) of the amended petition.

III (s). Admits that on or about June 1, 1928, the trustees of the aforesaid trust received, with respect to said 175 shares of stock of American Telephone & Telegraph Company, one warrant for each share held. Admits that said warrants entitled the holder thereof to acquire one new share of the stock of American Telephone & Telegraph Company for \$100.00 per share for each six warrants held.

III (t). Admits that on or about June 1, 1927, the trustees of the aforesaid trust received a 40% stock dividend with respect to said 600 shares of common stock of United States Steel Corporation. Denies all other allegations contained in subparagraph III (t) of paragraph 5 of the amended petition.

III (u). Admits that on or about July 10, 1928, the aforementioned securities were transferred from the trustees to the petitioner. Denies all other allegations contained in subparagraph III (u) of paragraph 5 of the amended petition.

III (v). Admits that on or about July 25, 1928, petitioner obtained 29 additional shares of the capital stock of American Telephone & Telegraph Company at an expenditure of \$2,998.60 through the exercise of the aforementioned rights. Denies all other allegations contained in subparagraph III (v) of paragraph 5 of the amended petition.

III (w). Admits that the petitioner sold the securities listed in subparagraph III (w) of paragraph 5 of the amended petition on the dates and for the amounts therein stated. Denies all other allegations contained in subparagraph III (w) of paragraph 5 of the amended petition.

III (x). Admits that in her income tax return for the calendar year 1933 petitioner reported that she sustained capital losses on the sales of the aforesaid securities in the amounts set out below:

Security	Amount reported as capital loss
840 shares common stock United States Steel Corporation-----	\$80,283.45
204 shares American Telephone & Telegraph Company-----	13,640.95
106 \$25,000.00 face amount Federal Land Bank (Louisville) bonds-----	4,437.50
\$8,000.00 face amount Federal Land Bank (Columbia) bonds----	1,390.00

Denies all other allegations contained in subparagraph III (x) of paragraph 5 of the amended petition.

III (y). Admits that the Commissioner held that petitioner's basis for each of the aforesaid securities was less than that claimed by the petitioner, and as a result determined that the capital loss sustained on the sale of the United States Steel Corporation stock was \$36,892.50 less than the amount claimed by the petitioner; that the capital loss sustained on the sale of the American Telephone & Telegraph Company stock was \$9,293.60 less than the amount claimed by the petitioner, that the capital loss sustained on the sale of the Federal Land Bank bonds (Louisville) was \$605.63 less than the amount claimed by the petitioner; and that the capital loss sustained on the sale of the Federal Land Bank bonds (Columbia) was \$204.00 less than the amount claimed by the petitioner. Admits that the Commissioner held that the basis to petitioner for each of the aforesaid securities was the cost thereof to the aforementioned trustees. Denies all other allegations contained in subparagraph III (y) of paragraph 5 of the amended petition.

IV (z). Admits all the allegations contained in subparagraph IV (z) of paragraph 5 of the amended petition.

IV (aa). Admits that on July 1, 1921 the executors transferred of record and delivered to the trustees for petitioner 100 of  
107 said shares of stock of The Atchison, Topeka & Santa Fe Railway Company. Admits that on July 1, 1921, the fair market value of said 100 shares of said stock was \$8,050.00. Denies all other allegations contained in subparagraph IV (aa) of paragraph 5 of the amended petition.

V (bb). Admits that on April 30, 1928, said trustees purchased four additional shares of said stock for \$400.00. Denies all other allegations contained in subparagraph IV (bb) of paragraph 5 of the amended petition.

IV (cc). Admits that upon petitioner's attaining the age of 28 years on July 10, 1928, the trustees transferred said 104 shares of stock of The Atchison, Topeka & Santa Fe Railway Company to petitioner. Denies all other allegations contained in subparagraph IV (cc) of paragraph 5 of the amended petition.

IV (dd). Admits that on December 20, 1933, petitioner sold 104 shares of The Atchison, Topeka & Santa Fe Railway Company stock for \$5,509.94.

IV (ee). Admits that on her income tax return for the calendar year 1933 petitioner claimed \$14,237.06 as a capital loss sustained on the sale of 104 shares of stock of The Atchison, Topeka & Santa Fe Railway Company. Denies all other allegations contained in subparagraph IV (ee) of paragraph 5 of the amended petition.

IV (ff). Admits that the Commissioner determined that petitioner sustained a capital loss of only \$2,940.06 on the sale of said stock, the same being the difference of the fair market value of the 100 shares on July 1, 1921, plus the cost to the 108 trustees of the four shares later acquired by them, and the sale price of \$5,509.94. Denies all other allegations contained in subparagraph IV (ff) of paragraph 5 of the amended petition.

V (gg). Admits that on or about July 1, 1921, petitioner's father's executors transferred of record and delivered to the trustees for petitioner the securities listed in subparagraph V (gg) of paragraph 5 of the amended petition. Admits that on July 1, 1921, the values of the shares of common stock of Southern Pacific Company, Hotels Statler Company, Inc., and Union Pacific Railroad Company were as set out in said subparagraph V (gg) of paragraph 5 of the amended petition. Admits that the value of the \$10,000.00 face amount of New York corporate stock 4's of May 1, 1959, did not exceed \$9,650.00 and avers that the value of said City of New York corporate stock was \$79.50. Denies all other allegations contained in subparagraph V (gg) of paragraph 5 of the amended petition.

V (hh). Admits that upon petitioner's attaining the age of 28 years on July 10, 1928, the securities listed in subparagraph V (hh) of paragraph 5 of the amended petition were transferred from the trustees to the petitioner. Denies all other allegations contained in subparagraph V (hh) of paragraph 5 of the amended petition.

V (ii). Admits that on or about December 28, 1929, petitioner received on the stock of Hotels Statler Company, Inc., a 100% stock dividend of 160 shares. Denies all other allegations contained in subparagraph V (ii) of paragraph 5 of the amended petition.

109 V (jj). Admits that petitioner sold securities in the amounts, on the dates, and for the sales prices listed in subparagraph V (jj) of paragraph 5 of the amended petition.

V (kk). Admits that in her income tax return for the calendar year 1933 petitioner claimed capital losses on the above-mentioned sales in the amounts listed in subparagraph V (kk) of paragraph 5 of the amended petition. Denies all other allegations contained in subparagraph V (kk) of paragraph 5 of the amended petition.

V (ll). Admits that the Commissioner held that petitioner's capital losses on the sales of the above-mentioned securities are the differences between the value set out in subparagraph V (gg) of paragraph 5 of the amended petition and the sales prices

set out in subparagraph V (jj) of paragraph 5 of the amended petition, and as a result determined that the capital loss sustained on the sale of the City of New York corporate stock (4's of 1959) was \$293.75 less than the amount claimed by petitioner; that the capital loss sustained on the sale of the Southern Pacific Railroad Company stock was \$5,984.37 less than the amount claimed by petitioner; that the capital loss sustained on the sale of the Hotels Statler Company, Inc. stock was \$4,000.00 less than the amount claimed by the petitioner; and that the capital loss sustained on the sale of the Union Pacific Railway Company stock was \$7,712.50 less than the amount claimed by the petitioner. Avers that in determining the capital loss sustained on the sale of the \$10,000.00 face amount of City of New York corporate stock, the Commissioner erred in favor of the petitioner by using as the fair market value on July 1, 1921, of said corporate stock the sum of \$9,650.00 rather than the sum of \$7,950.00, the capital loss determined by the Commissioner being thereby overstated by the sum of \$1,700.00. De-

110 nies all other allegations contained in subparagraph V (ll) of paragraph 5 of the amended petition.

VI (mm). Admits that on July 1, 1921, petitioner's father's executors transferred of record and delivered to the trustees for petitioner \$50,000.00 face amount of the bonds of the City of Philadelphia (4's of 1946), \$10,000.00 face amount of the bonds of the City of Auburn, New York (4¾'s of 1933) and \$20,000.00 face amount of the bonds of the City of Rochester, New York (4½'s of 1933). Denies all other allegations contained in subparagraph VI (mm) of paragraph 5 of the amended petition.

VI (nn). Admits that the Commissioner determined that on the date of said transfer the fair market value of the City of Philadelphia bonds was \$50,687.50, the fair market value of the City of Auburn bonds was \$10,227.83, and the fair market value of the City of Rochester bonds was \$20,082.50.

VI (oo). Admits that on July 10, 1928, the aforesaid bonds were transferred from the trustees to the petitioner. Denies all other allegations contained in subparagraph VI (oo) of paragraph 5 of the amended petition.

VI (pp) & (qq). Admits all the allegations contained in subparagraphs VI (pp) and (qq) of paragraph 5 of the amended petition.

Vf. (rr). Admits that in her income tax return for the calendar year 1933 petitioner claimed \$11,259.59 as a capital loss sustained on the sale of said City of Philadelphia bonds, and claimed \$227.83 and \$548.00 as capital losses sustained on the redemption of the City of Auburn and City of Rochester

bonds, respectively. Denies all other allegations contained  
111. in subparagraph VI (rr) of paragraph 5 of the amended petition.

VII (ss). Admits that the Commissioner determined that a capital loss of only \$7,757.09 was sustained on the sale of the City of Philadelphia bonds; determined that the loss of \$227.83 on the redemption of the City of Auburn bonds was an ordinary and not a capital loss; and determined that the loss sustained on the redemption of the City of Rochester bonds was only \$82.50 and was an ordinary loss instead of a capital loss. Denies all other allegations contained in subparagraph VI (ss) of paragraph 5 of the amended petition.

VII (tt). Admits that on June 15, 1925, the executors of the estate of petitioner's father transferred of record and delivered to the trustees for petitioner 214 shares of the common stock of Niagara, Lockport & Ontario Power Company which had theretofore cost the said executors \$4,527.06. Admits that said 214 shares had a fair market value on June 15, 1925, of \$76.00 per share or an aggregate value of \$16,264.00. Denies all other allegations contained in subparagraph VII (tt) of paragraph 5 of the amended petition.

VII (uu). Admits all the allegations contained in subparagraph VI (uu) of paragraph 5 of the amended petition.

VII (vv). Admits that on August 31, 1925, the trustees purchased for \$1,202.50, 32½ additional shares of the common stock of Buffalo, Niagara & Eastern Power Corporation.

VII (ww) & (xx). Admits all the allegations contained in subparagraphs VII (ww) and (xx) of paragraph 5 of the amended petition.

112 VII (yy). Admits that upon petitioner's attaining the age of 28 years on July 10, 1928, the trustees transferred the 300 shares of preferred stock, 300 shares of common stock, and 75 shares of Class "A" common stock of Buffalo, Niagara & Eastern Power Corporation to petitioner. Denies all other allegations contained in subparagraph VII (yy) of paragraph 5 of the amended petition.

VII (zz). Admits that in 1929 petitioner exchanged said 300 shares of common stock of Buffalo, Niagara & Eastern Power Corporation for 1,200 shares of the common capital stock of Niagara Hudson Power Corporation and 300 Niagara Hudson Power Corporation option warrants. Denies all other allegations contained in subparagraph VII (zz) of paragraph 5 of the amended petition.

VII (aaa). Admits that in 1929 petitioner exchanged the 75 shares of Class "A" common stock of Buffalo, Niagara & Eastern Power Corporation for 300 shares of the common capital stock

of Niagara Hudson Power Corporation and 75 Class "A" option warrants of said Niagara Hudson Power Corporation. Denies all other allegations contained in subparagraph VII (aaa) of paragraph 5 of the amended petition.

VII (bbb). Admits the allegations contained in subparagraph VII (bbb) of paragraph 5 of the amended petition.

VII (ccc). Admits all the allegations contained in subparagraph VII (ccc) of paragraph 5 of the amended petition.

VII (ddd). Admits that on December 20, 1933, petitioner sold said 500 shares of the common stock of Niagara Hudson Power Corporation for \$2,506.75 and said 125 Class "A" option  
113 warrants of said corporation for \$40.24, and said 300 shares of preferred stock of Buffalo, Niagara & Eastern Power Corporation for \$4,800.50.

VII (eee). Admits that in her income tax return for the calendar year 1933, which was filed on or about March 15, 1934, with the Collector of Internal Revenue at Buffalo, New York, petitioner claimed \$12,340.51 as capital losses sustained on the sale of the 500 shares of common stock and 125 Class "A" option warrants of Niagara Hudson Power Corporation. Admits that in said income tax return petitioner claimed \$3,037.00 as a capital loss sustained on the sale of the 300 shares of preferred stock of Buffalo, Niagara & Eastern Power Corporation. Denies all other allegations contained in subparagraph VII (eee) of paragraph 5 of the amended petition.

VII (fff). Admits that the Commissioner determined that the capital loss sustained by petitioner on the sale of the 500 shares of common stock and 125 Class "A" option warrants of Niagara Hudson Power Corporation was only \$3,035.78. Admits that the Commissioner determined that petitioner realized a capital gain of \$2,363.46 on the sale of the 300 shares of preferred stock of Buffalo, Niagara & Eastern Power Corporation. Admits that the basis determined by the Commissioner for the 500 shares of common stock and 125 Class "A" option warrants of Niagara Hudson Power Corporation was \$5,582.77. Denies all other allegations contained in subparagraph VII (fff) of paragraph 5 of the amended petition.

VII (ggg). Admits that the basis for the 300 shares of preferred stock of Buffalo, Niagara & Eastern Power Corporation determined by the Commissioner was \$2,437.04

114 Denies all other allegations contained in subparagraph VII (ggg) of paragraph 5 of the amended petition.

VIII (hhh). Admits that on July 1, 1921, petitioner's father's executors transferred of record and delivered to the trustees for petitioner 4,964 shares of the stock of the F. W. Woolworth Company having a par value of \$100.00 per share which on that

date had a fair market value of \$110.00 per share. Denies all other allegations contained in subparagraph VII (hhh) of paragraph 5 of the amended petition.

VIII (iii). Admits all the allegations contained in subparagraph VIII (iii) of paragraph 5 of the amended petition. Denies all other allegations contained in subparagraph VII (hhh) of paragraph 5 of the amended petition.

VIII (jjj). Denies all the allegations contained in subparagraph VIII (jjj) of paragraph 5 of the amended petition.

VIII (lll). Admits that upon petitioner's attaining the age of 28 years on July 10, 1928, 15,000 shares of F. W. Woolworth Company stock were transferred from the trustees to petitioner. Denies all other allegations contained in subparagraph VIII (lll) of paragraph 5 of the amended petition.

VIII (mmm). Admits that on various dates petitioner acquired 1,000 shares of F. W. Woolworth Company stock, having a par value of \$25.00 each. Admits that petitioner expended in connection with the acquisition of this stock the sum of \$118,691.58.

115 • VIII (nnn). Admits that on or about June 24, 1929, after proper corporate action further reducing the par value of the corporation's shares from \$25.00 each to \$10.00 each, petitioner's holdings of 16,000 shares of \$25.00 par value common stock of F. W. Woolworth Company were converted into 40,000 shares of \$10.00 par value stock of said company. Denies all other allegations contained in subparagraph VIII (nnn) of paragraph 5 of the amended petition.

VIII (ooo). Admits that on various dates in December 1933 petitioner sold 10,000 shares of F. W. Woolworth Company stock for an aggregate amount of \$391,462.25. Denies all other allegations contained in subparagraph VIII (ooo) of paragraph 5 of the amended petition.

VIII (ppp). Admits that in her income tax return for the calendar year 1933 petitioner claimed \$278,854.33 as a capital loss sustained on the sale of said stock. Denies all other allegations contained in subparagraph VIII (ppp) of paragraph 5 of the amended petition.

VIII (qqq). Admits that the Commissioner disallowed said item and determined that petitioner realized a capital gain of \$318,128.92 upon the sale of said 10,000 shares of stock of F. W. Woolworth Company. Admits that the Commissioner held that the identity of petitioner's shares of stock of F. W. Woolworth Company was lost; that the "first in, first out" rule must be applied; that the 10,000 shares sold in December 1933 must be deemed to have been out of the lot of 37,500 shares of stock transferred on July 10, 1928, from the trustees to the petitioner; and that petitioner's basis for the shares sold is the fair

116 market value on July 1, 1921, of 666 $\frac{2}{3}$  shares of F. W. Woolworth Company stock. Denies all other allegations contained in subparagraph VIII (qqq) of paragraph 5 of the amended petition.

IX (rrr). Admits that prior to December 1933 petitioner purchased \$50,000.00 face amount of the corporate stock of the City of New York (4 $\frac{1}{2}$ 's of 1957). Admits that said bonds (corporate stock) were registered securities. Denies all other allegations contained in subparagraph IX (rrr) of paragraph 5 of the amended petition.

IX (sss). Admits that in December 1933 petitioner sold all of said bonds. Denies all other allegations contained in subparagraph IX (sss) of paragraph 5 of the amended petition.

IX (ttt). Admits that on or about the same date petitioner purchased corporate stock of the City of New York (4 $\frac{1}{2}$ 's of 1957). Denies all other allegations contained in subparagraph IX (ttt) of paragraph 5 of the amended petition.

IX (uuu). Admits that in her income tax return for the calendar year 1933 petitioner claimed \$5,250.00 as an ordinary loss sustained on the sale of said corporate stock of the City of New York (4 $\frac{1}{2}$ 's due 1957).

IX (vvv). Admits that the Commissioner disallowed all of said deduction upon the ground that petitioner acquired substantially identical securities within thirty days before or after said sale. Denies all other allegations contained in subparagraph IX (vvv) of paragraph 5 of the amended petition.

117 (www). Respondent avers that in determining the deficiency for 1933 the Commissioner allowed petitioner a deduction for contributions in the amount of \$3,321.00.

Denies generally and specifically each and every allegation contained in the taxpayer's amended petition not hereinbefore admitted, qualified, or denied.

6. In further defense of the Commissioner's determination, and in support of an alternative claim to an increased deficiency for the year 1933, respondent relies upon the following additional facts:

(a) With respect to the securities sold by petitioner in the year 1933, which were owned by petitioner's father on the date of his death or derived from securities owned by petitioner's father on the date of his death, such securities were acquired by petitioner by transfer in trust before January 1, 1921; and the bases to petitioner of the securities so acquired were the fair market values thereof on May 16, 1915, as provided in Sec. 113 (a) (4) of the Revenue Act of 1932.

(b) On information and belief, the fair market values of said securities owned by petitioner's father on the date of his death

were less than the amounts used as bases by the Commissioner in making his determination, and were less than the respective bases claimed by the petitioner in this proceeding.

(e) With respect to securities sold by petitioner in 1933, which were purchased by the executors or which were derived from securities purchased by the executors, such securities were acquired by petitioner by purchase, and the bases to  
118 petitioner of the securities so acquired were the respective costs thereof, viz, the amounts paid by the executors.

(d) On information and belief, the respective costs of such securities were less than the bases used by the Commissioner in his determination, and were less than the bases claimed by the petitioner in this proceeding.

Wherefore, it is prayed that the Board redetermine the correct amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, viz, \$86,937.47 plus any and all additional amounts which may result from the correction of any error made by the Commissioner. The Commissioner hereby makes claim for the increased deficiency resulting from such redetermination.

(Signed) J. P. WENCHEL,

Y.

J. P. Wenchel,

*Chief Counsel,*

*Bureau of Internal Revenue.*

Of Counsel:

W. HERDMAN SCHWATKA,

EDWARD L. UPDIKE,

*Special Attorneys,*

*Bureau of Internal Revenue.*

119 Before United States Board of Tax Appeals

Docket No. 84639

[Same title.]

*Amended reply*

Filed at Hearing Dec. 14, 1938

The petitioner, by her attorney, Ralph M. Andrews, in reply to respondent's amended answer herein, admits and denies the affirmative allegations thereof as follows:

4 X. Admits that the deduction allowable to petitioner on account of contributions during the calendar year 1933 should be computed in accordance with the provisions of paragraph 23 (n) of the Revenue Act of 1932. Denies each and every other alle-

gation contained in paragraph "4 X" of respondent's amended answer.

5 I. (e). Admits that the Commissioner of Internal Revenue has included an amount of \$1,145.34 in petitioner's gross income for the calendar year 1933 as dividends received from F. W. Woolworth & Co., Ltd.

5 V (gg). Denies that the \$10,000.00 face amount of corporate stock of the City of New York issued for water supply purposes, 4's of 1959, referred to in paragraph 5 V (gg) of respondent's amended answer, had a fair market value of \$7,900.00 on July 1, 1921, and alleges that said stock had a fair market value on said date of not less than \$8,025.00.

120 5 V (ll). Denies that the \$10,000.00 face amount of corporate stock of the City of New York issued for water supply purposes, 4's of 1959, referred to in paragraph "5 V (ll)" of the respondent's amended answer had a fair market value of July 1, 1921, of only \$7,900.00 and alleges that said corporate stock had a value of not less than \$8,025.00 on said date. Denies all other allegations contained in said paragraph.

6 (a). Denies all of the allegations contained in paragraph "6 (a)" of respondent's amended answer.

6 (b). Denies that the fair market values of all the securities owned by petitioner's father on the date of his death were less than the amounts used as bases by the Commissioner in making his determination and less than the respective bases claimed by the petitioner in this proceeding.

6 (c). Denies all of the allegations contained in paragraph "6 (c)" of respondent's amended answer.

6 (d). Denies all of the allegations contained in paragraph "6 (d)" of respondent's amended answer.

Denies generally and specifically each and every allegation contained in respondent's amended answer not hereinbefore admitted, qualified or denied.

Wherefore, petitioner prays that the Board may hear this proceeding and determine that the respondent erred in the respects stated in paragraph "4" of the amended petition, that the claims for an additional deficiency made in respondent's amended  
121 answer are without merit and should be denied and that petitioner is entitled to the relief prayed for in paragraph "6" of the amended petition.

(S) RALPH M. ANDREWS,  
*Counsel for Petitioner,*

*Office and Post Office Address, 1330 Marine Trust Bldg.,  
239 Main Street, Buffalo, New York.*

(LLs.)

122 Before United States Board of Tax Appeals

Docket No. 84639

[Same title.]

*Stipulation of facts*

Filed at Hearing Dec. 14, 1938

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true for the purpose of this proceeding and in the determination of the above appeal, provided, however, that this stipulation shall be without prejudice to the right of either party hereto to introduce other and further evidence at the hearing hereof not inconsistent with the facts herein stipulated to be true.

1. Marjorie K. Campbell, the petitioner herein, is and at all material times was a resident of the Village of East Aurora, County of Erie, and State of New York.

## I

2. With respect to the allegation of error contained in paragraph 4-I of the petition herein and denied in paragraph 4-I of respondent's answer, it is now stipulated by the parties hereto, in view of the decision of the United States Supreme Court in *Mary Duke Biddle v. Commissioner of Internal Revenue*, 302

U. S. 573, that the respondent has correctly disallowed a  
123 credit of \$381.78 claimed by petitioner in her return on account of certain British taxes in the same amount paid by F. W. Woolworth & Co., Ltd., in respect of dividends received by petitioner on her shares in said company. It is further stipulated that the Commissioner has correctly reduced petitioner's gross income by \$381.78, the amount of said tax.

## II.

3. With respect to the error alleged in paragraph 4-II of the petition herein and denied in paragraph 4-II of respondent's answer, it is now stipulated and agreed by the parties hereto, and without prejudice to either of them, that of the total dividends amounting to \$672.00 received by petitioner during the calendar year 1933, from Great Southern Lumber Company, 83.6544% or \$562.16 is taxable to petitioner as determined by the respondent in his deficiency notice (page 2 of Exhibit "A" of the petition in this proceeding).

## III

4. Petitioner was born on July 10, 1900, as Marjorie Knox. On June 7, 1927, she was married to J. Hazard Campbell.

5. Petitioner's father, Seymour H. Knox, died on May 16, 1915, leaving a last will and testament, a true and correct copy of which is annexed hereto, designated Exhibit "A" and hereby made a part hereof. Said will was probated on June 3, 1915, in the office of the Surrogate of Erie County, New York. On June 3, 1915, letters testamentary of the last will and testament of Seymour H. Knox, deceased, were duly granted to Grace M. Knox, Henry D. Knox, and Walter P. Cooke. Seymour H. Knox, petitioner's brother, attained the age of twenty-one years 124 on September 1, 1919. On May 24, 1921, said Seymour H.

Knox took and filed with the Surrogate of Erie County the oath of office as executor and on December 21, 1922, nunc pro tunc as of May 24, 1921, supplemental letters testamentary of said last will and testament were duly granted to him "jointly with said executors Grace M. Knox, Henry D. Knox, and Walter P. Cooke." Said executors are hereinafter referred to as "the executors."

6. On May 24, 1921, Henry D. Knox, Walter P. Cooke, and Seymour H. Knox (hereinafter referred to as "the trustees") took and filed with the Surrogate of Erie County, New York, their oaths of office as trustees of the trust under "Article Twenty-first (D)" of the will (Exhibit "A"). On July 1, 1921, the trustees opened their records and books of account and rented a safe deposit vault in the following name: "Walter P. Cooke, Henry D. Knox, Seymour H. Knox, Trustees for Marjorie Knox."

7. Thereafter the trustees of said trust purchased the following securities on the dates, in the amounts and for the purchase prices set out below:

Date	Quantity	Security	Purchase Price
Dec. 16, 1925	300 shares common stock.....	U. S. Steel Corporation.....	\$40,275.00
Dec. 19, 1925	300 shares common stock.....	U. S. Steel Corporation.....	40,012.50
Dec. 19, 1925	150 shares common stock.....	American Telephone & Telegraph Company.....	21,343.75
125 May 3, 1923	\$25,000.00 face amount 4½% bonds due 1933.	Federal Land Bank (Louisville).....	25,125.00
May 27, 1925	\$8,000.00 face amount 4½% bonds due 1935.	Federal Land Bank (Columbia).....	8,220.00

8. On or about June 8, 1926, the trustees received in respect of said 150 shares of common stock of the American Telephone & Telegraph Company a warrant entitling them to obtain one

new share of the common stock of said company at \$102.75 per share for each six shares held. At the time such rights were issued, the respective values of stock and rights were as follows:

The stock per share.....	\$143.50
Each right (six rights being necessary to acquire one new share).....	6.3125

On July 30, 1926, the trustees exercised said rights and obtained twenty-five additional shares, paying in connection therewith \$2,568.75 in cash.

9. On or about June 1, 1927, the trustees received a 40% stock dividend consisting of 240 shares of the common stock of the U. S. Steel Corporation on the 600 shares of common stock of said corporation which had been purchased by the trustees as stated in paragraph 7 hereof.

10. On or about June 1, 1928, the trustees received on the 175 shares of common stock of American Telephone & Telegraph Company referred to in paragraphs 7 and 8 hereof warrants entitling the holder thereof to obtain one new share of the common stock of the American Telephone & Telegraph Company at \$103.40 per share for each six shares held. At the time said warrants or rights were issued the respective values of stock and rights were as follows:

The stock per share.....	\$189.875
Each right (six rights being necessary to obtain one share).....	14.3125

On or about June 22, 1928, the trustees sold one of said rights, receiving therefor \$12.00, the full amount of which they reported in their income tax return for the calendar year 1928, and paid a tax thereon.

11. Petitioner attained the age of 28 years on July 10, 1928. Thereupon and on that date the trustees in accordance with the will (Exhibit "A") of petitioner's father transferred of record and delivered to the petitioner certain securities and property including the securities mentioned in paragraphs 7 to 10, inclusive, hereof, which on that date had the fair market values set out below:

Quantity	Security	Unit value	Total value
840 shares common stock.....	U. S. Steel Corporation.....	\$139.50	\$117,180.00
175 shares common stock.....	American Telephone & Telegraph Company.	176.5625	30,998.44
174 rights.....	American Telephone & Telegraph Company.	12.125	2,109.75
\$25,000.00 face amount 4½% bonds due 1953.	Federal Land Bank (Louisville).....	100.125	25,031.25
\$8,000.00 face amount 4½% bonds due 1955.	Federal Land Bank (Columbia).....	100.375	8,030.00

127 12. On July 25, 1928, petitioner obtained 29 additional shares of the capital stock of American Telephone & Telegraph Company at an expenditure of \$2,998.60 through the exercise of the aforementioned warrants or rights.

13. During the calendar year 1933 the petitioner sold the following securities heretofore mentioned in paragraphs 7 to 12 hereof, on the dates and for the amounts set out below:

Date	Quantity	Security	Sales price
Dec. 1, 1933	840 shares common stock	U. S. Steel Corporation	\$36,864.66
Dec. 20, 1933	204 shares common stock	American Telephone & Telegraph Company	22,465.15
Dec. 21, 1933	\$25,000.00 face amount 4½% bonds due 1953.	Federal Land Bank (Louisville)	20,593.75
Dec. 27, 1933	\$8,000.00 face amount 4½% bonds due 1955.	Federal Land Bank (Columbia)	6,630.00

14. On her income tax return for the calendar year 1933 petitioner claimed as the bases for these securities and as capital losses the amounts set out below:

Quantity	Security	Amount claimed as basis	Amount claimed as capital loss
840 shares common stock	U. S. Steel Corporation	\$117,180.00	\$80,283.34
204 shares common stock	American Telephone & Telegraph Company	36,204.70	13,739.55
\$25,000.00 face amount 4½% bonds due 1953.	Federal Land Bank (Louisville)	25,031.25	4,437.50
\$8,000.00 face amount 4½% bonds due 1955.	Federal Land Bank (Columbia)	8,020.00	1,390.00

15. The amounts claimed as the bases of these securities in petitioner's return are the amounts which petitioner claimed as the fair market values of the securities on the date she attained her twenty-eighth birthday plus, in the case of the stock of the American Telephone & Telegraph Company, the amount of \$2,998.60, expended on July 25, 1928 in obtaining the 29 shares of the stock of that company.

16. The Commissioner in the notice of deficiency determined that the petitioner sustained capital losses on the sales of these securities in the following amounts:

Quantity	Security	Amount used by Commissioner as basis	Amount allowed by Commissioner as capital losses
840 shares common stock	U. S. Steel Corporation	\$80,287.50	\$43,390.84
204 shares common stock	American Telephone & Telegraph Company	26,911.10	4,445.95
\$25,000.00 face amount 4½% bonds due 1953.	Federal Land Bank (Louisville)	24,425.62	3,581.87
\$8,000.00 face amount 4½% bonds due 1955.	Federal Land Bank (Columbia)	7,516.00	1,186.00

17. The amounts used by the Commissioner as the bases of these securities are the amounts which the Commissioner determined were the costs to the trustees of the securities described in paragraph 7 hereof, plus in the case of the stock of the American Telephone & Telegraph Company the amounts of \$2,568.75 and \$2,998.60, expended in obtaining on rights additional shares of said stock.

IV

18. On May 16, 1915, the date of the death of petitioner's father, he was the owner, among other securities, of 500 shares of the common capital stock of The Atchison, Topeka & Santa Fe Railway Company which had a fair market value on that date of \$99.25 per share or a total value of \$49,625.00.

19. On July 1, 1921, petitioner's father's executors transferred of record and delivered 100 of said 500 shares of the common capital stock of The Atchison, Topeka & Santa Fe Railway Company to the trustees of the trust provided for in "Article Twenty-first (D)" of petitioner's father's will. Thereupon the trustees deposited in the safe deposit vault referred to in paragraph 6 hereof, the certificates in the names of the trustees, representing said shares. On July 1, 1921, said 100 shares of The Atchison, Topeka & Santa Fe Railway Company's stock had a fair market value of \$80.50 per share or an aggregate value of \$8,050.00.

20. Thereafter, The Atchison, Topeka & Santa Fe Railway Company issued to its common stockholders of record on January 27, 1928, warrants entitling them to obtain one additional share of said common stock at \$100.00 per share for each 25 shares then held by them. Accordingly, on February 15, 1928, the trustees of the aforesaid trust received a warrant entitling them to obtain four additional shares of said common stock. The rights embodied in said warrant were exercised by the trustees on April 16, 1928, and they obtained for \$400.00 in cash four additional shares of the common stock of The Atchison, Topeka & Santa Fe Railway Company. At the time said rights were issued the respective values of stock and rights were as follows:

The stock per share.....	\$189.625
Each right (25 rights being necessary to obtain one new share).....	3.6875

131 21. Upon petitioner attaining the age of twenty-eight years on July 10, 1928, the trustees of said trust on that date, pursuant to "Article Twenty-first (D)" of the will, transferred of record and delivered the 104 shares of the common capital stock of The Atchison, Topeka & Santa Fe Railway

Company to the petitioner. On that date the shares of The Atchison, Topeka & Santa Fe Railway Company had a fair market value of  $188\frac{1}{2}$  per share.

22. On December 20, 1933, petitioner sold said 104 shares of The Atchison, Topeka & Santa Fe Railway Company stock for \$5,509.94.

23. In her income tax return for the calendar year 1933 petitioner claimed \$14,237.06 as a capital loss sustained on the sale of the 104 shares of stock of The Atchison, Topeka & Santa Fe Railway Company. This amount represented the difference between the sales price of said stock and the amount of \$19,747.00 claimed by the petitioner to be the fair market value thereof on her twenty-eighth birthday.

24. In his notice of deficiency the Commissioner determined that the petitioner's capital loss on said sale was \$2,940.06, which amount represented the difference between \$8,050.00, the value of 100 shares of said stock on July 1, 1921, plus the \$400.00 expended at the time of obtaining the four additional shares by the exercise of rights, and the sales price.

# V

25. Upon the death of petitioner's father on May 16, 1915, he was the owner, among other securities, of the following, which on the date of his death had fair market values as set out below:

332	Quantity	Security	Unit value	Total value
	\$50,000.00 face value Corporate stock issued for water supply purposes (4's of May 1, 1950).....	City of New York.....	\$96.50	\$48,250.00
	627 shares common stock.....	Southern Pacific Company.....	87.37496	54,784.12
	500 shares common stock.....	Hotels Statler Company, Inc.....	20.00	10,000.00
	500 shares common stock.....	Union Pacific Railroad Co.....	124.375	62,187.50

26. On April 16, 1921, Hotels Statler Company, Inc., declared a 60% dividend payable April 18, 1921, to its common stockholders of record April 14, 1921, in common stock of the company. The executors of the will of Seymour H. Knox, deceased, petitioner's father, being the holders of said 500 shares of common stock on April 14, 1921, received on or about April 18, 1921, in respect thereof 300 additional shares of said common stock.

27. On July 1, 1921, the executors of the will of petitioner's father transferred of record and delivered to the trustees of the trust provided for in "Article Twenty-first (D)" of the will, out of the securities mentioned in paragraphs 25 and 26,

the following securities, which on July 1, 1921, had the fair market values set out below:

133	Quantity	Security	Unit value	Total value
	\$10,000.00 face value Corporate stock issued for water supply purposes (4's of May 1, 1959).....	City of New York.....	\$79.50	\$7,950.00
	125 shares common stock.....	Southern Pacific Company.....	74.375	9,296.88
	160 shares common stock.....	Hotels Statler Company, Inc.....	75.00	12,000.00
	100 shares common stock.....	Union Pacific Railroad Co.....	117.875	11,787.50

Thereupon the trustees deposited in the safe deposit vault referred to in paragraph 6 hereof, said bonds and the certificates in the names of the trustees representing said shares.

28. When petitioner attained the age of twenty-eight years on July 10, 1928, the trustees of the trust provided for in "Article Twenty-first (D)" of petitioner's father's will transferred of record and delivered on that date to petitioner the securities mentioned in paragraph 27 hereof. On that date said securities had fair market values as set out below:

134	Quantity	Security	Unit value	Total value
	\$10,000.00 face value Corporate stock issued for water supply purposes (4's of May 1, 1959).....	City of New York.....	\$99.25	\$9,925.00
	125 shares common stock.....	Southern Pacific Company.....	120.25	15,031.25
	160 shares common stock.....	Hotels Statler Company, Inc.....	125.00	20,000.00
	100 shares common stock.....	Union Pacific Railroad Co.....	194.9375	19,493.75

29. On December 20, 1929, Hotels Statler Company, Inc., declared a 100% dividend payable December 23, 1929, to its stockholders of record on December 20, 1929, in common stock of that company. Accordingly, the petitioner being the owner on December 20, 1929, of said 160 shares of common stock received thereon on or about December 23, 1929, 160 additional shares of said common stock.

30. Petitioner sold the above-described securities on the dates and for the amounts set out below:

135 Date	Quantity	Security	Sale price
Dec. 21, 1933	\$10,000.00 face amount Corporate stock issued for water supply purposes (4's of May 1, 1959).....	City of New York.....	\$7,837.50
Dec. 20, 1933	125 shares common stock.....	Southern Pacific Company.....	2,381.87
Dec. 21, 1933	320 shares common stock.....	Hotels Statler Company, Inc.....	2,833.60
Dec. 20, 1933	100 shares common stock.....	Union Pacific Railroad Company.....	11,191.00

31. On her income tax return for the calendar year 1933 petitioner claimed as capital losses on the sales of the above securities the amounts set out below:

Quantity	Security	Amount claimed as basis	Amount claimed as capital loss
\$10,000.00 face amount Corporate stock issued for water supply purposes (4's of May 1, 1939).	City of New York.....	\$9,943.75	\$2,106.25
125 shares common stock.....	Southern Pacific Company.....	15,281.25	12,899.38
320 shares common stock.....	Hotels Statler Company, Inc.....	16,000.00	13,166.40
100 shares common stock.....	Union Pacific Railroad Company.....	19,500.00	8,309.00

136 The amounts claimed by the petitioner as the bases of said securities are the amounts which she claimed were the fair market values on the date she attained her twenty-eighth birthday of the securities described in paragraph 28.

32. The Commissioner of Internal Revenue in his notice of deficiency determined that petitioner sustained capital losses on the sale of these securities as follows:

Quantity	Security	Amount used by the Commissioner as basis	Amount allowed by the Commissioner as a capital loss
\$10,000.00 face amount Corporate stock issued for water supply purposes (4's of May 1, 1939).	City of New York.....	\$9,650.00	\$1,812.50
125 shares common stock.....	Southern Pacific Company.....	9,296.88	6,915.01
320 shares common stock.....	Hotels Statler Company, Inc.....	12,000.00	9,166.40
100 shares common stock.....	Union Pacific Railroad Company.....	11,787.50	596.50

The amounts thus used by the Commissioner as the bases of these securities were the amounts which the Commissioner then held were the fair market values on July 1, 1921, of the securities described in paragraph 27.

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## VI

33. The executors of the will of Seymour H. Knox, deceased, petitioner's father, purchased the following securities on or about the dates and for the amounts set out below:

Date	Quantity	Security	Unit price	Purchase price
July 1, 1916	\$250,000.00 face amount (4's of 1946)	City of Philadelphia.....	\$101.375	\$253,437.50
Dec. 31, 1917	\$50,000.00 face amount (4's Jan. 1, 1933).	City of Auburn.....	102.2783	51,139.15
Mar. 4, 1918	\$100,000.00 face amount (4's of Jan. 15, 1933).	City of Rochester.....	100.4125	100,412.50

34. On July 1, 1921, the executors of petitioner's father's will transferred of record and delivered to the trustees of the trust provided for in "Article Twenty-first (D)" of said will out of the securities mentioned in paragraph 33 hereof, the following securities which on July 1, 1921, had fair market values as set out below:

Quantity	Security	Amount
\$50,000.00 face amount (4's of 1946).....	City of Philadelphia.....	\$50,687.50
\$10,000.00 face amount (4¾'s Jan. 1, 1933).....	City of Auburn.....	10,227.83
\$20,000.00 face amount (4½'s of Jan. 15, 1933).....	City of Rochester.....	20,082.50

138 Thereupon the trustees deposited said bonds in the safe deposit vault referred to in paragraph 6 hereof.

35. When petitioner attained the age of twenty-eight years on July 10, 1928, the trustees of the trust provided for in "Article Twenty-first (4)" of petitioner's father's will, pursuant to said will, transferred of record and delivered said securities on that date to petitioner. On that date said securities had the fair market values set out below:

Quantity	Security	Amount fair market value
\$50,000.00 face amount (4's of 1946).....	City of Philadelphia.....	\$49,909.38
\$10,000.00 face amount (4¾'s of Jan. 1, 1933).....	City of Auburn.....	10,243.75
\$20,000.00 face amount (4½'s of Jan. 15, 1933).....	City of Rochester.....	20,371.41

36. On November 6, 1933, petitioner sold said bonds of the face amount of \$50,000.00 of the City of Philadelphia (4's of 1946) for \$42,930.41 in cash.

37. On January 1, 1933, said bonds of the face amount of \$10,000.00 of the City of Auburn (4¾'s of January 1, 1933) and on January 15, 1933, said bonds of the fact amount of \$20,000.00 of the City of Rochester (4½'s of January 15, 1933) matured and became payable and during the month of January, 1933, petitioner received on the redemption of said bonds of the City  
139 of Auburn the sum of \$10,000.00 and on the redemption of said bonds of the City of Rochester the sum of \$20,000.00.

38. In her income-tax return for the calendar year 1933 petitioner claimed as capital losses on the above-mentioned bonds the amounts set out below:

Quantity	Security	Amount claimed as basis	Amount claimed as capital loss
\$50,000.00 face amount (4's of 1946).....	City of Philadelphia.....	\$54,190.00	\$11,259.59
\$10,000.00 face amount (4¼'s of Jan. 1, 1933).....	City of Auburn.....	10,227.83	227.83
\$20,000.00 face amount (4½'s of Jan. 15, 1933).....	City of Rochester.....	20,548.00	548.00

The amounts thus claimed as the bases of these bonds are the amounts which the petitioner claimed were the fair market values of said bonds on the date she attained her twenty-eighth birthday.

39: The Commissioner of Internal Revenue in his notice of deficiency, determined that petitioner sustained losses in respect of said bonds as follows:

Quantity	Security	Amount used by Commissioner as basis	Amount of Losses Allowed by Commissioner
\$50,000.00 face amount (4's of 1946).....	City of Philadelphia.....	\$30,687.50	<sup>1</sup> \$7,757.09
\$10,000.00 face amount (4¼'s of Jan. 1, 1933).....	City of Auburn.....	10,227.83	<sup>2</sup> 227.83
\$20,000.00 face amount (4½'s of Jan. 15, 1933).....	City of Rochester.....	20,082.50	<sup>2</sup> 82.50

<sup>1</sup> Capital loss.

<sup>2</sup> Ordinary loss.

The amounts used by the Commissioner as the bases of said bonds are the amounts which the Commissioner held were the values of said bonds on July 1, 1921.

## VII

40. Some time prior to June 15, 1925, the executors of the will of petitioner's father purchased 1,068 shares of the common stock of Niagara, Lockport & Ontario Power Company at a cost of \$22,642.88. On June 15, 1925, the executors transferred of record and delivered 214 of said shares of common stock of the Niagara, Lockport & Ontario Power Company to the trustees of the trust provided for in "Article Twenty-first (D)" of the petitioner's father's will. Thereupon the trustees deposited in the safe deposit vault referred to in paragraph 6 hereof, the certificates in the names of the trustees, representing said 214 shares. Said 214 shares of the Niagara, Lockport & Ontario Power Company stock had a fair market value on June 15, 1925, of \$76.00 per share or an aggregate value of \$16,264.00.

41. On August 1, 1925, the trustees exchanged the 214 shares of common stock of Niagara, Lockport & Ontario Power Company for 267½ shares of the \$1.60 preferred stock and 267½

shares of the common stock without par value of Buffalo, Niagara & Eastern Power Corporation. Said exchange was nontaxable under Section 203 (b) (2) of the Revenue Act of 1924 and Section 112 (b) (3) of the Revenue Act of 1932. On the date of said exchange the fair market value of the common stock of Buffalo, Niagara & Eastern Power Corporation was \$42.375 per share and the fair market value of the \$1.60 preferred stock of said corporation was \$24.375 per share.

42. On August 28, 1927, the trustees purchased 321½ additional shares of the common stock of Buffalo, Niagara & Eastern Power Corporation for \$1,202.50. On the same date the trustees purchased 32½ additional shares of the \$1.60 preferred stock of the par value of \$25.00 per share of Buffalo, Niagara & Eastern Power Corporation for \$780.25. On January 3, 1928, the trustees purchased 75 shares of the Class "A" stock of Buffalo, Niagara & Eastern Power Corporation for \$1,500.00.

43. Upon petitioner attaining the age of twenty-eight years on July 10, 1928, the trustees transferred of record and delivered on that date to petitioner, pursuant to the will, the 300 shares of common stock, 300 shares of \$1.60 preferred stock, and 75 shares of Class "A" stock of Buffalo, Niagara & Eastern Power Corporation.

142 44. On July 10, 1928, the securities mentioned in paragraph 43 had fair market values as set out below:

	Fair market value (per share)
Common Stock-----	\$40.25
Class "A" Stock-----	37.50
Preferred Stock-----	26.25

45. On August 19, 1929, the petitioner exchanged said 300 shares of common stock of Buffalo, Niagara, & Eastern Power Corporation for 1,200 shares of the common capital stock of Niagara Hudson Power Corporation and 300 Niagara Hudson Power Corporation option warrants. On the same date the petitioner exchanged the 75 shares of Class "A" stock of Buffalo, Niagara & Eastern Power Corporation for 300 shares of the common capital stock and 75 option warrants of the Niagara Hudson Power Corporation. Said exchanges were nontaxable transactions under Sections 112 (b) (5) of the Revenue Acts of 1928 and 1932.

46. On August 19, 1929, the fair market values of the common stock and Class "A" option warrants of Niagara Hudson Power Corporation were \$26.75 per share and \$9.00 per warrant, respectively.

47. On August 8, 1932, pursuant to corporate action taken by the corporation to reduce its capital stock from 45,000,000 shares

of the par value of \$10.00 each to 15,000,000 shares of the par value of \$15.00 each, petitioner exchanged her 1,500 shares of old common stock of Niagara Hudson Power Corporation having a par value of \$10.00 each for 500 shares of the new common stock having a par value of \$15.00 each of said corporation, reducing her holdings of said common stock to 500 shares, and exchanged her 375 option warrants of Niagara Hudson Power Corporation for 125 option warrants of said corporation. Said exchanges were nontaxable under the provisions of Section 112 (b) (3) of the Revenue Act of 1932.

48. On December 20, 1933, petitioner sold said 500 shares of the common stock of Niagara Hudson Power Corporation for \$2,506.75, said 125 option warrants of said corporation for \$40.24 and the 300 shares of the \$1.60 preferred stock of Buffalo, Niagara & Eastern Power Corporation for \$4,800.50.

49. In her income tax return for the calendar year 1933 petitioner claimed \$12,340.51 as a capital loss on the sale of the 500 shares of common stock and 125 option warrants of Niagara Hudson Power Corporation, which amount was computed upon a claimed basis of \$14,887.50, which was claimed by petitioner to be the value on her twenty-eighth birthday of the 300 shares of common stock and the 75 shares of Class "A" stock of Buffalo, Niagara & Eastern Power Corporation. In her income tax return for the calendar year 1933 petitioner claimed \$3,037.00 as a capital loss on the sale of the 300 shares of the \$1.60 preferred stock of Buffalo, Niagara & Eastern Power Corporation, which amount was computed upon a claimed basis of \$7,837.50, which was claimed by the petitioner to be the fair market value of said stock on her twenty-eighth birthday.

50. The Commissioner of Internal Revenue in his notice of deficiency determined that the petitioner sustained a capital loss of \$3,035.78 on the sale of the 500 shares of common stock and 125 option warrants of Niagara Hudson Power Corporation. In determining said amount the Commissioner held that the basis to petitioner of said securities was \$5,582.77 computed as follows:

141 (1) That part of the cost to the executors of 214 shares of Niagara, Lockport & Ontario Power Company common stock which is allocable to 267½ shares of common stock of Buffalo, Niagara & Eastern Power Corporation (63.4831% of \$4,537.06)	\$2,880.27
(2) Cost to the trustees of the 32½ additional shares of the common stock of Buffalo, Niagara & Eastern Power Corporation	1,202.50
(3) Cost to the trustees of the 75 shares of Class "A" stock of Buffalo, Niagara & Eastern Power Corporation	1,500.00
Total	\$5,582.77

51. In his notice of deficiency the Commissioner determined that the petitioner realized a capital gain of \$2,363.46 on the sale of the 300 shares of \$1.60 preferred stock of Buffalo, Niagara & Eastern Power Corporation. In determining said amount the Commissioner used as the basis of said stock \$2,437.04 computed as follows:

(1) That part of the cost to the executors of the 214 shares of Niagara, Lockport & Ontario Power Company common stock which is allocable to 267½ shares of the \$1.60 preferred stock of Buffalo, Niagara & Eastern Power Corporation (36.5169% of \$4,537.06)	\$1,656.79
(2) Cost to the trustees of the 32½ additional shares of the \$1.60 preferred stock of Buffalo, Niagara & Eastern Power Corporation	780.25
Total	\$2,437.04

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## VIII

52. Upon the death of petitioner's father on May 16, 1915, he was the owner, among other securities, of 19,080 shares of the common stock, par value of \$100.00 per share, of the F. W. Woolworth Company. On May 16, 1915, the fair market value of said stock was \$101.125 per share.

53. On June 1, 1920, petitioner's father's executors received an additional 5,724 shares of said stock as a stock dividend on the 19,080 shares, bringing their total holdings of said stock to 24,804 shares.

54. On July 1, 1921, the executors transferred of record and delivered 4,964 shares of the 24,804 shares of common stock of F. W. Woolworth Company to the trustees of the trust provided for in "Article Twenty-first (D)" of petitioner's father's will. Thereupon, the trustees deposited in the safe deposit vault referred to in paragraph 6 hereof, the certificates in the names of the trustees, representing said shares. On July 1, 1921, the fair market value of said stock was \$110.00 per share, or an aggregate fair market value of \$546,040.00.

55. On or about May 21, 1924, the F. W. Woolworth Company increased the number of its authorized shares of common stock from 1,000,000 to 4,000,000 and reduced the par value of each share from \$100.00 to \$25.00. In connection therewith the trustees during the month of June 1924, exchanged their holdings of 4,964 shares of the \$100.00 par value common stock of F. W. Woolworth Company for 19,856 shares of the new \$25.00 par value common stock of the company. Said exchange

146 was nontaxable under Sections 203 (b) (1) and (2) of the Revenue Act of 1924 and Sections 112 (b) (2) and (3) of the Revenue Act of 1932.

56. On January 29, 1925, the trustees purchased 144 additional shares of the \$25.00 par value common stock of F. W. Woolworth Company for \$16,344.00 in cash. Of these 144 shares, 125 thereof were sold by the trustees on December 16, 1925, for \$25,035.00. Of the lot of 19,856 shares received on the exchange described in paragraph 55 hereof, the trustees on December 29, 1925, sold at a profit 125 shares for \$25,736.22. Thereafter, the trustees purchased 250 additional shares of said stock on the dates and for the amounts set out below:

Date purchased	Number of shares	Purchase price
Jan. 15, 1926	50	\$10,265.00
Jan. 16, 1926	100	20,330.00
Jan. 18, 1926	100	20,330.00

57. After the making of the purchases and sales set out in paragraph 56 hereof, the trustees held 20,000 shares of the \$25.00 par value capital stock of F. W. Woolworth Company, received as follows:

	No. of shares
Received on the exchange described in paragraph 55 (19,856 less 125)	19,731
Received on the purchase of Jan. 29, 1925 (144 less 125)	19
Received on the purchases of Dec. 1929 (50, 100 and 100)	250
Total	20,000

147 58. On February 1, 1927 the trustees received a 50% stock dividend consisting of 10,000 shares of the \$25.00 par value common stock of the F. W. Woolworth Company on their then holdings of 20,000 shares of such stock.

59. When petitioner attained the age of twenty-eight years on July 10, 1928, the trustees, pursuant to the will, transferred of record and delivered to petitioner on that date 15,000 shares of the \$25.00 par value common stock of the F. W. Woolworth Company. Said 15,000 shares were out of the holdings of 19,856 shares received by the trustees on the exchange described in paragraph 55 hereof. The \$25.00 par value common stock of F. W. Woolworth Company had a fair market value on July 10, 1928, of \$183.125 per share.

60. On November 26, 1926, petitioner purchased 650 shares of the \$25.00 par value common stock of F. W. Woolworth Company for \$115,717.88. On February 1, 1927, petitioner received a 50% stock dividend consisting of 325 shares of the \$25.00 par value stock on the 650 shares purchased as set forth above.

61. On January 27, 1927, petitioner purchased 25 shares of the \$25.00 par value capital stock of F. W. Woolworth Company for \$2,973.70.

62. On May 15, 1929, the F. W. Woolworth Company increased its authorized capital stock from \$100,000,000.00, consisting of 4,000,000 shares of a par value of \$25.00 per share, to \$200,000,000.00, consisting of 20,000,000 shares of a par value of \$10.00 per share. At the same time the company offered to issue to its stockholders shares of the new \$10.00 par value stock in exchange for the \$25.00 par value stock then outstanding at the rate of  $2\frac{1}{2}$  shares of the \$10.00 par value stock for each share of the \$25.00 par value stock held by them. Thereupon petitioner exchanged her then holdings of 16,000 shares (consisting of the 15,000 shares received from the trustees as set out in paragraph 59 hereof and the 1,000 shares received as set out in paragraphs 60 and 61 hereof), of the \$25.00 par value common capital stock of F. W. Woolworth Company for 40,000 shares of the \$10.00 par value capital stock of that company. Identification of said 40,000 shares as being derived from particular acquisitions at certain times and with certain bases or prices was lost on said exchange. Said exchange was nontaxable under Sections 112 (b) (2) and (3) of the Revenue Acts of 1928 and 1932.

63. On the following dates petitioner sold 10,000 of said 40,000 shares of the \$10.00 par value common stock of F. W. Woolworth Company in the amounts and for the prices stated:

Date of sale	Number of shares sold	Net sales price
Dec. 20, 1933	500	\$20,077.50
Dec. 21, 1933	600	24,145.50
Dec. 22, 1933	2,800	109,241.25
Dec. 26, 1933	1,500	58,270.00
Dec. 27, 1933	3,000	118,165.00
Dec. 28, 1933	1,600	61,863.00
Total	10,000	\$391,462.25

The shares sold as stated in this paragraph cannot be identified as being out of particular acquisitions.

64. In her income tax return for the calendar year 1933, petitioner claimed \$278,854.32 as capital losses sustained on the sales mentioned in paragraph 63 hereof. In computing said amount, petitioner used as the bases of said shares the sum of \$670,316.58, consisting of the \$118,691.58 cost to petitioner of the 1,000 shares received as set out in paragraphs 60 and 61 hereof and \$551,625.00 which the petitioner claimed was the fair market value on July 10, 1928 of 3,000 of the 15,000 shares referred to in paragraph 59 hereof.

65. In his notice of deficiency (Exhibit A of the petition in this proceeding), the Commissioner of Internal Revenue held:

"An analysis of your account with the Woolworth stock shows that through the  $2\frac{1}{2}$  for 1 exchange in 1929 the identity of your various holdings in this stock was lost.

"Therefore, in accordance with article 600(4) of Regulations 77, the 10,000 shares sold in 1933 have been held to have come from the earliest acquisitions of the stock. This adjustment, which comprises the greater portion of the increase of \$701,089.97, is as follows:

7,500 shares of value at July 5, 1928, used by you.....	\$551, 625. 00
2,500 shares cost to you in 1926, 1927.....	118, 691. 58
Total cost used by you.....	\$670, 316. 58
Value as at July 1, 1921, of 666 $\frac{2}{3}$ shares at 100 <sup>1</sup> (represented by the 10,000 shares sold).....	73, 333. 33
Cost overstated.....	\$596, 983. 25 <sup>2</sup>

<sup>1</sup> Typographical error. This figure should be 110.

150

## IX

66. On December 29, 1932, petitioner purchased \$25,000.00 face amount of the corporate stock of the City of New York ( $4\frac{1}{2}$ 's issued May 1, 1907, interest payable on May 1 and November 1 of each year, maturity on May 1, 1957), paying therefor \$23,500.00. On the same date petitioner purchased \$25,000.00 face amount of the corporate stock of the City of New York ( $4\frac{1}{2}$ 's issued November 1, 1908, interest payable on May 1 and November 1 of each year, maturity on November 1, 1957), paying therefor \$23,500.00. Both lots of bonds were registered securities.

67. On December 22, 1933, petitioner sold said \$25,000.00 face amount of said bonds maturing May 1, 1957, for \$20,875.00, and said \$25,000.00 face amount of said bonds maturing November 1, 1957, for \$20,875.00.

68. On December 23, 1933, petitioner purchased \$10,000.00 face amount of the corporate stock of the City of New York ( $4\frac{1}{2}$ 's issued May 1, 1907, interest payable on May 1 and November 1 of each year, maturity on May 1, 1957), paying therefor \$8,512.50. On the same date petitioner purchased \$50,000.00 face amount of the corporate stock of the City of New York ( $4\frac{1}{2}$ 's issued March 1, 1913, interest payable on March 1 and September 1 of each year, maturity on March 1, 1963), paying therefor \$41,875.00. The bonds purchased as stated in this paragraph were coupon bonds.

69. In her income tax return for the calendar year 1933 petitioner claimed \$5,250.00 as ordinary losses sustained on the sale mentioned in paragraph 67 hereof.

70. In his notice of deficiency the Commissioner of Internal Revenue disallowed all of said amount of \$5,250.00, upon the ground that petitioner acquired substantially identical securities on December 23, 1933, and that such losses are not to be recognized under the provisions of Section 118 (a) of the Revenue Act of 1932.

## X

71. Petitioner during the year 1933 made contributions in the amount of \$3,321.80 to recipients of the kind described in Section 23 (n) of the Revenue Act of 1932. In the notice of deficiency the Commissioner of Internal Revenue has allowed petitioner a deduction in the full amount of such contributions.

72. The executors of the last will and testament of petitioner's father, Seymour H. Knox, deceased, and the trustees of the trust created under "Article Twenty-first (D)" of petitioner's father's will, complied with the provisions of said will and the requirements of the laws of the State of New York with respect to distributions of income including accumulated income.

73. The executors, the trustees and the petitioner at all times kept their respective books of account and filed their respective tax returns on a cash receipts and disbursements basis.

(Sgd.) RALPH M. ANDREWS,  
*Counsel for Petitioner.*

(Signed) J. P. WENCHEL

Y.

J. P. Wenchel,

*Chief Counsel,  
Bureau of Internal Revenue.*

DDoc.

152 Exhibit A Annexed to Stipulation of Facts

## LAST WILL AND TESTAMENT OF SEYMOUR H. KNOX

DATED MAY 12TH, 1915

### LAST WILL AND TESTAMENT OF SEYMOUR H. KNOX

I, Seymour H. Knox, of the City of Buffalo, County of Erie and States of New York, being of sound mind and memory, do hereby make, publish, and declare this my last Will and Testament, in manner following, that is to say:

ARTICLE FIRST. I direct my executors, hereinafter named to pay all my lawful debts and funeral expenses. I direct my executors hereinafter named to pay from the funds in my estate any

transfer tax or taxes, or any collateral inheritance, succession, or legacy tax or taxes imposed by law at the time of my death, upon any and all property, or interest therein, passing under and by virtue of the terms of this my last Will and Testament, and I will and direct that all gifts, bequests, and devises herein mentioned shall be paid at the net amount herein stated without any deduction on account of any such tax or taxes.

153 ARTICLE SECOND. I hereby authorize and direct my executors hereinafter named to cause to be erected in Forest Lawn Cemetery, in the City of Buffalo, N. Y., a suitable monument or mausoleum at an expense of not exceeding Fifty thousand dollars (\$50,000) therefor, to be paid from the funds of my estate.

ARTICLE THIRD. I give and devise unto my wife, Grace M. Knox, the house, stable, land, and premises and their appurtenances, situate on the easterly side of Delaware Avenue between Utica and Ferry Streets in the City of Buffalo, and now occupied by my wife and myself as a residence; to have and to hold the same unto my said wife, Grace M. Knox, and to her heirs and assigns forever.

I also give and bequeath unto my said wife, Grace M. Knox, all the pictures, furniture, rugs, books, ornaments, tableware, plate, silver, linen, and all other household furniture, and equipment, all jewelry and clothing, and also all horses, carriages, automobiles, and stable and automobile equipment owned by me at the time of my death (excepting only trotting-bred horses, sulkies, harnesses, and other equipment hereinafter mentioned and referred to in Article Eighth hereof).

ARTICLE FOURTH. I also give and bequeath unto my wife, Grace M. Knox, the sum of Two hundred fifty thousand dollars (\$250,000) and I will and direct that said legacy be paid to my said wife in securities owned by me at the time of my death to be selected by her and taken by her at their appraised value.

ARTICLE FIFTH. I give and bequeath to my brother, Burtis L. Knox, now residing at Chaffee, Erie County, N. Y.,  
154 fifty (50) shares of the common capital stock of F. W. Woolworth Company, a corporation organized under the laws of the State of New York; and in addition thereto, I give and bequeath to my said brother, Burtis L. Knox, an annuity of Twelve hundred dollars (\$1,200) and direct my executors hereinafter named to pay over said annuity to my said brother in quarterly payments of Three hundred dollars (\$300) each during his natural life. I direct my said executors to set aside the sum of Thirty thousand dollar' (\$30,000) for the purpose of producing said annuity and at the death of my said brother,

I give, devise, and bequeath the property so set aside to produce said annuity unto my son, Seymour H. Knox, if he be then living; if not, to my daughters, Dorothy Knox and Marjorie Knox, to be divided between them, share and share alike.

Notwithstanding the foregoing provisions, I further will and direct that if on the 1st day of January, in the year Nineteen hundred and thirty-three, my said brother, Burtis L. Knox, shall be then living, that the annual payments to him shall then cease, and in that event I give, devise, and bequeath to said Burtis L. Knox, all of the property and estate then held to produce such income for his benefit, pursuant to the provisions of this Article-Fifth of my last Will and Testament.

Article Sixth. I give and bequeath to my brother, Henry D. Knox, of the City of Buffalo, three hundred (300) shares of the common capital stock of F. W. Woolworth Company. I make no other provision for the benefit of my said brother, Henry D. Knox, for the reason that I have during my lifetime made other provision for his benefit.

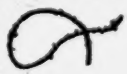
Article Seventh. I give and bequeath unto Catherine Avery, cousin of my wife, who now resides at Los Angeles, 155 California, One hundred (100) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE EIGHT. I give and bequeath unto Benjamin F. White of East Aurora, five (5) of the trotting-bred horses owned by me at the time of my death; said horses to be selected by said Benjamin F. White. I also give and bequeath to said Benjamin F. White necessary harnesses for said horses so selected by him and two sulkies; said harnesses and sulkies to be selected by him from the harnesses and sulkies owned by me at the time of my death, and that the remaining trotting-bred horses, sulkies, and harnesses be sold as hereinafter provided.

ARTICLE NINTH. I give and bequeath to the Home for the Friendless, located in the City of Buffalo, N. Y., One hundred (100) shares of the common capital stock of said F. W. Woolworth Company; and to the Charity Organization of Buffalo, one hundred (100) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE TENTH. I give and bequeath unto the Buffalo Fine Arts Academy, five hundred (500) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE ELEVENTH. I give and bequeath to the Methodist Episcopal Church located at Russell, St. Lawrence County, N. Y., Fifty (50) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following purposes: the said shares of stock so bequeathed to be held or sold



and the proceeds invested and, from time to time, reinvested, and the net income thereon used to assist in defraying the current expenses of said church.

156 ARTICLE TWELFTH. I give and bequeath unto William T. Damon, now in my employ, the full amount due or to become due to me upon a certain mortgage made by him to me and covering property situate on the shore of Lake Erie and in the Province of Ontario, Canada, and I direct my executors to cancel and discharge said mortgage.

ARTICLE THIRTEENTH. I give and bequeath unto Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, and doing business in the City of Buffalo, N. Y., and to Walter P. Cooke of the City of Buffalo, N. Y., Two thousand (2,000) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold and, from time to time, in their discretion, to sell the same or portions thereof, and to invest and reinvest the same, or the proceeds thereof, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund, and to pay over the net income arising therefrom in quarterly payments, to my sister, Carrie E. Fowler, during her natural life, and at the death of my said sister, Carrie E. Fowler, I give, devise, and bequeath the property then constituting such trust fund unto such person or persons and in such proportions as shall have been in that behalf appointed in and by the terms of the last Will and Testament duly executed of my said sister, Carrie E. Fowler, and in the event that my said sister, Carrie E. Fowler, shall fail to exercise such power of appointment, then at the death of my said sister, I give, devise, and bequeath the property constituting such trust fund unto her sons, Seymour K. Fowler and Raymond P. Fowler, share and share alike. In

157 case of the prior death of either of said sons, the issue of said deceased son to take the share to which the parent would have been entitled if living. And in case of the prior death of both Seymour K. Fowler and Raymond P. Fowler leaving no issue them surviving, I give, devise, and bequeath the property constituting said trust fund to my heirs.

Notwithstanding the foregoing provision, I further will and direct that in event that my said sister Carrie E. Fowler, is living on the 1st day of January, in the year Nineteen hundred and thirty-three, the trust hereby created for her benefit shall then terminate, and I give, devise, and bequeath to my said sister, Carrier E. Fowler, in that event, all of the property then constituting said trust fund.

ARTICLE FOURTEENTH. I give and bequeath unto my nephew, Seymour K. Fowler, son of my sister, Carrie E. Fowler, Three Hundred (300) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE FIFTEENTH. I give and bequeath unto said Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, and Walter P. Cooke of the City of Buffalo, N. Y., Three hundred (300) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold and, from time to time, in their discretion, to sell the same or portions thereof and to invest and reinvest the same or the proceeds thereof, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund to pay over the net income arising therefrom, semiannually, unto my nephew, Raymond P. Fowler, son of my sister Carrie E. Fowler, until he shall arrive at the age of 158 twenty-five (25) years, at which time I give and bequeath one-half of said trust fund to my nephew Raymond P. Fowler, and direct my said trustees to pay over one-half of such trust fund to him and thereafter to pay to my said nephew Raymond P. Fowler, the net income arising from the balance of said trust fund until he shall arrive at the age of thirty (30) years, at which time, I give, devise, and bequeath the balance of said trust fund to my said nephew, Raymond P. Fowler, and direct my said trustees to transfer and convey said property then constituting said trust fund to him. In case of the death of said Raymond P. Fowler before he shall arrive at the age of thirty (30) years, I give, devise, and bequeath whatever property may remain in said trust fund unto his children, if any, to be divided among them, share and share alike, and if he shall leave no children then living, I give, devise, and bequeath the balance of said trust fund to his brother, Seymour K. Fowler, if he then be living; if not, I give, devise, and bequeath the balance of said trust fund to my heirs.

ARTICLE SIXTEENTH. I give and bequeath unto Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, doing business in Buffalo, N. Y., and Walter P. Cooke of the City of Buffalo, N. Y., Two hundred fifty (250) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold and, from time to time, in their discretion, to sell the same or portions thereof and to invest and reinvest the same or the proceeds thereof, and to collect the rents, issues, in-

come, and profits on the property from time to time constituting such trust fund and to pay over the net income arising therefrom semiannually, unto my niece, Verona Knox, daughter of my brother, Burtis L. Knox, until she shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath the property constituting said trust fund to my said niece, Verona Knox. In case of the death of my said niece, Verona Knox, before arriving at the age of thirty (30) years, I give, devise, and bequeath the property then constituting said trust fund unto her children, if any then living, share and share alike. If she shall have no children then living, I give, devise, and bequeath said trust fund unto her sister, Ethel Knox, if she be then living; if not, then to my heirs.

ARTICLE SEVENTEENTH. I give and bequeath unto the Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, and doing business at Buffalo, N. Y., and Walter P. Cooke of the City of Buffalo, N. Y., Two hundred fifty (250) shares of the common capital stock of said F. W. Woolworth Company, in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold and, from time to time, in their discretion, to sell the same or portions thereof and to invest and reinvest the same or the proceeds thereof, and to collect the rents, income, issues, and profits on the property, from time to time constituting such trust fund and to pay over the net income arising therefrom semi-annually, unto my niece, Ethel Knox, daughter of my brother, Burtis L. Knox, until she shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath the property constituting said trust fund to my said niece, Ethel Knox. In case of the death of my said niece, Ethel Knox, before arriving at the age of thirty (30) years, I give, devise, and bequeath the property constituting said trust fund unto her children, if any, share and share alike. If she shall have no children then living, I give, devise, and bequeath said trust fund unto her sister, Verona Knox, if she be then living; if not, then to my heirs.

ARTICLE EIGHTEENTH. I give and bequeath unto each of the children of my brother, Henry D. Knox, who may be living at the time of my death One hundred (100) shares of the common capital stock of said F. W. Woolworth Company.

ARTICLE NINETEENTH. I give and bequeath unto each household servant employed in or about by homes at Buffalo and East Aurora, including chauffeurs and stable employes, who have been in my employ at the time of my death for upwards of one (1) year.

the sum of One hundred dollars (\$100) to each such servant for each and every year of such continuous employment prior to the date of my death, and I will and direct that the determination of my executors as to who is entitled to receive the legacy under this Article of my last Will and Testament and the period of employment of each such person, and the amount of the legacy hereunder which each is to receive, shall be final and conclusive and binding upon all parties.

ARTICLE TWENTIETH. I give and devise unto my son, Seymour H. Knox, the real property constituting my farm and summer home located at East Aurora, N. Y., together with the residence and all barns and other buildings and structures situate thereon and all stable and farming equipment used or purchased for use in connection with the same.

ARTICLE TWENTY-FIRST. In determining the amount of my residuary estate for the purpose of making distribution thereof 161 of as hereinafter provided, I direct that there be first set aside the following property, to wit:

All the shares of the capital stock owned by me at the time of my death in the following corporations: The Marine National Bank of Buffalo, a banking corporation having its principal place of business in the City of Buffalo, N. Y.; Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, having its principal place of business in the City of Buffalo, N. Y.; The Central National Bank of Buffalo, a banking corporation having its principal place of business in the City of Buffalo, N. Y.; Bankers Trust Company, a corporation organized under the laws of the State of New York, having its principal place of business in the City of New York, N. Y.; Irving National Bank, a corporation having its principal place of business in the City of New York, N. Y.; The Chase National Bank, a corporation having its principal place of business in the City of New York, N. Y.; which capital stock I have by subdivision (C) of this Article numbered "Twent, first" of this my last Will and Testament, given and bequeathed to my brother, Henry D. Knox and Walter P. Cooke, in trust, for the benefit of my son, Seymour H. Knox.

All the rest, residue, and remainder of my property and estate, real, personal, and mixed, of every name, nature, and description, and wher'soever situate, but not including, however, the shares of the capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first of my last Will and Testament, I give, devise, and bequeath as follows:

(A) Forty (40) per cent thereof (not including, however, the shares of the capital stock of the six corporations

162 mentioned in the first paragraph of this Article Twenty-first), I give, devise, and bequeath unto my brother, Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, N. Y., in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold and from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over the net income arising therefrom quarterly unto my wife, Grace M. Knox, for and during the term of her natural life. At the death of my said wife, I give, devise, and bequeath one-half ( $\frac{1}{2}$ ) of the property then constituting said trust fund unto such person or persons, corporation or corporations, and in such proportions as shall have been in that behalf appointed in the last Will and Testament, duly executed, of my said wife, Grace M. Knox; the remaining one-half ( $\frac{1}{2}$ ) of the property constituting said trust fund, and in case my said wife shall have failed to exercise the power of appointment in reference to one-half ( $\frac{1}{2}$ ) of said trust fund above mentioned, the entire property then constituting said trust fund, I will and direct shall be divided into three (3) equal parts or portions; one part or portion to be held by my said trustees for the benefit of my daughter, Dorothy Knox, and the net income thereon paid over to her semiannually, until she shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath said part or portion to my said daughter, Dorothy Knox; one part or portion to be held by my said trustees for the benefit of my son, Seymour H. Knox, and the net income thereon paid over to him semiannually, until he shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath said part or portion to my said son, Seymour H. Knox; one

163 part or portion to be held by my said trustees for the benefit of my daughter, Marjorie Knox, and the net income thereon paid over to her, semiannually, until she shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath said part or portion to my said daughter, Marjorie Knox. In case of the death of either or any of my said children before reaching the age of thirty (30) years, I give, devise, and bequeath the trust fund so held for the benefit of either or any of my said children, unto the issue of such deceased child or children, share and share alike, and in case either or any of my said children shall die before reaching the age of thirty (30) years leaving no issue surviving, then I give, devise, and bequeath the property constituting said trust fund so held for the benefit of such deceased child or children unto my children who may

then be living, to be divided between them share and share alike.

In the event that at the time of the death of my said wife Grace M. Knox, any or all of my children shall be less than twenty-one (21) years of age, I direct that only so much of the income payable to such child or children, shall be used for the support and education of such child or children as my trustees shall deem wise and proper and that the remainder of said income shall be accumulated during the minority of such child or children and paid over when each such child arrives at the age of twenty-one (21) years.

(B) Twenty (20) per cent of all the rest, residue, and remainder of my said estate (not including, however, the shares of the capital stock of the six corporations mentioned in the first paragraph of this Article Twenty-first) I give, devise, and bequeath to my brother Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, in trust nevertheless, for the following uses and purposes, to wit:

164 To receive, hold and, from time to time, invest and re-invest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my trustees shall seem wise and proper toward the support, maintenance and education of my daughter, Dorothy Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over such accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said daughter Dorothy Knox, until she shall arrive at the age of twenty-eight (28) years, at which time I give, devise, and bequeath to my said daughter, Dorothy Knox, one-half ( $\frac{1}{2}$ ) of the property then constituting said trust fund and I direct my said executors to pay over to my daughter, Dorothy Knox, the net income on the remaining one-half ( $\frac{1}{2}$ ) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Dorothy Knox, and to her heirs and assigns forever.

In the event that my said daughter, Dorothy Knox, shall die before reaching the age of thirty-five (35) years, I give, devise, and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Dorothy Knox, if any, surviving her, to be divided among

them, share and share alike. In case there be no issue her surviving, then I give, devise, and bequeath said trust fund unto her heirs.

(C) Twenty (20) per cent of said rest, residue, and remainder of my property and estate, I give, devise, and bequeath  
165 unto my brother, Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, N. Y., together with all of the capital stock owned by me at the time of my death in the following corporations, to wit: The Marine National Bank of Buffalo, a banking corporation having its principal place of business in the City of Buffalo, N. Y.; Bankers Trust Company of Buffalo, a corporation organized under the laws of the State of New York, having its principal place of business in the City of Buffalo, N. Y.; The Central National Bank of Buffalo, a banking corporation having its principal place of business at Buffalo, N. Y.; Bankers Trust Company, a corporation organized under the laws of the State of New York, having its principal place of business in the City of New York, N. Y.; Irving National Bank, a corporation having its principal place of business in the City of New York, N. Y.; and The Chase National Bank, a corporation having its principal place of business in the City of New York, N. Y., in trust nevertheless, for the following uses and purposes, to wit:

To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting said trust fund and to pay over so much of the net income thereon as to my said trustees shall seem wise and proper toward the support, maintenance and education of my son, Seymour H. Knox, until he shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during his minority for his benefit, and to pay over such accumulated income to him when he shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income on said trust fund until he shall arrive  
at the age of twenty-five (25) years, at which time I give,  
166 devise, and bequeath to my said son, Seymour H. Knox, a portion of said trust fund, to wit, Five hundred thousand dollars (\$500,000), and direct my executors to pay over said sum of Five hundred thousand dollars (\$500,000) to my said son, Seymour H. Knox, and thereafter to pay over the net income on the trust fund remaining in their hands to my said son until he shall arrive at the age of thirty (30) years, at which time I give, devise, and bequeath one-half ( $\frac{1}{2}$ ) of the trust fund then remaining in the hands of my said trustees to my said son, Seymour H. Knox, and I direct my said trustees to transfer and convey the

same to him and thereafter to pay over the net income arising on the trust fund remaining in their hands to my said son, Seymour H. Knox, until he shall arrive at the age of thirty-five (35) years at which time I give, devise, and bequeath the balance of said trust fund unto my said son, Seymour H. Knox. In case of the death of my said son, Seymour H. Knox, prior to the time when he shall arrive at the age of thirty-five (35) years, I give, devise, and bequeath all of said trust fund which may not then have been paid over to him, or to the possession of which he may not at the time of his death have been entitled, unto his issue, if any, him surviving, to be divided among them, share and share alike. And in the event that there be no issue him surviving, I give, devise and bequeath the balance of said trust fund unto his heirs.

(D) Twenty (20) percent of all the rest, residue, and remainder of my said estate (not including, however, the shares of capital stock and of the six corporations mentioned in the first paragraph of this Article Twenty-first) I give, devise, and bequeath to my brother, Henry D. Knox and Walter P. Cooke, both of the City of Buffalo, in trust nevertheless, for the following uses and purposes, to wit:

167 To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my said trustees shall seem wise and proper toward the support, maintenance, and education of my daughter, Marjorie Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over the accumulated income to her when she shall arrive at the age of twenty-one (21) years and hereafter to pay over the entire net income to my said daughter, Marjorie Knox, until she shall arrive at the age of twenty-eight (28) years, at which time, I give, devise, and bequeath to my said daughter, Marjorie Knox, one-half ( $\frac{1}{2}$ ) of the property then constituting said trust fund and I direct my said trustees to pay over the net income on the remaining one-half ( $\frac{1}{2}$ ) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Marjorie Knox, and to her heirs and assigns forever.

In the event that my said daughter, Marjorie Knox, shall die before reaching the age of thirty-five (35) years, I give, devise, and bequeath any part or portion of said trust fund, which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of

said Marjorie Knox, if any, surviving her, to be divided among them, share and share alike. And in case there be no issue her surviving, then I give, devise, and bequeath said trust fund unto her heirs.

ARTICLE TWENTY-SECOND. I hereby grant unto the trustees of the various trusts created by this my last Will and  
168 Testament, with the same force and effect as though these provisions were repeated separately in respect to each of said trusts, full power and authority to invest and, from time to time, reinvest all of the property and funds coming into the hands of my various trustees, in such property, stock, bonds, and other securities as to the trustees of each said trust shall seem wise and proper, whether or not such investments shall be those, which, under the laws of the State of New York, an executor and trustee is permitted to make, and without regard to limitations or restrictions, hereby giving and granting unto such trustees, full power and authority to receive from my executors and to retain as a part of the trust funds in their hands any and all stocks, bonds, or other securities, which may form a part of my estate at the time of my death, and which they shall receive from the executors thereof in the course of the distribution of my said estate, hereby granting unto my said trustees full power and authority to exchange any stocks, bonds, or other securities belonging to any trust for any stocks, bonds, or other property upon any consolidation, merger, or reorganization of any of the companies whose stocks or securities are so held by me at the time of my death, or which may form a part of any such trust fund at any time thereafter, and I hereby give and grant unto my said trustees full power and authority to sell, lease, convey, or dispose of any and all property, real, personal, or mixed, which may at any time form a part or any or all of said trust funds, and to execute leases, conveyances, and transfers thereof, on such terms and conditions as to them shall seem wise and proper.

It is my wish, however, which I hereby express to my trustees, that within five (5) years after my death the property constituting the various trusts hereby created shall be so invested  
169 that at least fifty (50) per cent in value of each of said trust funds shall be invested in securities then constituting legal investments for savings banks, executors, or trustees, or in unencumbered real property situate in the retail business districts of cities of at least two hundred thousand (200,000) population, unless in the opinion of my said trustees additional time is required to accomplish such investments, and then, and in that event, I desire that such investments be made at an early date after the expiration of said five (5) years.

**ARTICLE TWENTY-THIRD.** In addition to the powers hereinbefore conferred upon the trustees of the various trusts created by the terms of this my last Will and Testament, I hereby grant full power and authority to my said trustees to invest portions of the trust funds of any of the trusts herein created in unencumbered real estate situate in the retail business districts of any cities in the State of New York, having a population of more than two hundred thousand (200,000), provided, however, that not more than twenty (20) percent of the value of any trust fund shall be at any one time so invested in real property.

**ARTICLE TWENTY-FOURTH.** I further will and direct that in the event that I shall own any or all of the following parcels of real estate, now owned by me, at the time of my death, that the same may be transferred by my executors to the trustees of any of the trusts created by the provisions of Article Twenty-first hereof, and accepted by said trustees as a part of said trust funds at the valuations fixed by the appraisers in the proceedings for determining the amount of the transfer tax under the laws of the State of New York:

The property known as Nos. 416-418 Main Street in the City of Buffalo, N. Y.;

170 The property known as Nos. 446-448 Main Street in the City of Buffalo, N. Y.;

The property now owned by me in the City of Kansas City, Mo.;

The property now owned by me in the City of Toledo, O.

The property now owned by me in the City of Akron, O.

It is my suggestion to my executors and trustees, although not binding in case changed conditions shall render it unwise, that the property known as Nos. 416-418 Main Street, in the City of Buffalo, N. Y., shall become a part of the trust created for the benefit of my daughter, Dorothy Knox, and that the property known as Nos. 446-448 Main Street, in the City of Buffalo, N. Y., shall become a part of the trust created for the benefit of my daughter, Marjorie Knox.

**ARTICLE TWENTY-FIFTH.** I hereby further authorize and empower my said executors, in the administration of my said estate to determine and make the division of my property and estate unto the various trust funds created by the provisions of Article Twenty-first hereof, as in their judgment shall seem wise and proper, and I further authorize any of my said trustees in the event of a division being necessary of any trust funds hereby created in accordance with the terms and direction of this Will, to make such division both of real and personal property, and to execute such conveyances and transfers as may be necessary to effect the same. The action of my executors and any of said

trustees, pursuant to the authority of this my last Will and Testament, to be binding upon all parties interested in my estate and in any such trust fund. I further will and direct that should any parcel of real estate owned by me at the time of my death become a part of any of the trust funds created by the terms of 171 Article Twenty-first of this my last Will and Testament, at the appraised value thereof, as hereinbefore stated, that the trustees of the remaining trusts created by the terms of said Article Twenty-first hereof, shall upon request, execute proper and suitable conveyances of their interest in said parcel or parcels of real estate, so as to effectually vest the title thereof in the trustees of the trust fund of which said parcel of real estate may become a part.

ARTICLE TWENTY-SIXTH. I hereby nominate, constitute and appoint my wife, Grace M. Knox, to be the executrix, and my brother, Henry D. Knox, and Walter P. Cooke, both of the City of Buffalo, to be the executors, of this my last Will and Testament, hereby giving and granting to my executors full power and authority to sell and convey any and all property, real, personal, or mixed, of which I may die seized or possessed, or in which I may have any interest. I hereby will and direct that no bond or other security shall be required of my said executors or of any of the trustees of the various trusts created by this my last Will and Testament. I hereby will and direct that my executors shall have three (3) years from and after my decease in which to settle my estate and to distribute the same in accordance with the provisions hereof, and may retain from time to time as a part of my estate any and all real property, stocks, bonds, securities, and other property, which may form a part of my estate at the time of my death, hereby granting unto my said executors full power and authority to exchange such stocks, bonds, or other securities for any other stocks, bonds, or other property upon any consolidation, merger, or other reorganization of any of the companies whose stocks or securities are so held.

I hereby authorize my executors and trustees to pay out of the income and revenues of my said estate, or of each trust fund herein created, all taxes or assessments which 172 shall be imposed or assessed upon the real or personal property belonging to my estate or to any such trust fund, all amounts necessary for insurance premiums, repairs, and generally all other expenses necessary or proper in the management or preservation of such trust funds or estate, each such trust fund bearing so far as practicable, its own burden.

I further will and direct that in view of the provisions herein contained for her benefit, that my wife, Grace M. Knox, serve as

executrix of this my last Will and Testament, without fees, commissions, or compensation, and I further will and direct that in lieu of the commissions and compensation provided by law, that each of my acting executors, administrators with the will annexed or trustees, whether herein appointed or appointed by the court, excepting only the Bankers Trust Company of Buffalo, as Trustee of the various trusts created by Articles Thirteenth, Fifteenth, Sixteenth, and Seventeenth hereof, shall during his service as such, receive an annual compensation of Twelve thousand dollars (\$12,000) each, to be paid out of the income of my estate and the trust funds herein contained and apportioned ratably between the said estate and the said trust funds created by the provisions of Article Twenty-first hereof in substantial proportion to the value of the property contained in each, from time to time, such sum to be received in full payment for his services as such executor, administrator, and trustee under this Will, and to cover the entire services of each, both as executor, administrator, and trustee. I hereby expressly will and direct that the appointment of any other executor, trustee, or administrator with the will annexed which may be made by any court, shall be upon the express condition, that every such executor, trustee, or administrator, shall at the time of his appointment,

173 accept the compensation above provided for his services, in lieu of commissions or compensation provided by law. I will and direct that the Bankers Trust Company of Buffalo in acting as trustee of Articles Thirteenth, Fifteenth, Sixteenth, and Seventeenth hereof shall receive the usual commissions for such services as allowed by law.

Any executor or trustee, however, may during the period of his administration of my estate serve as director, officer, or attorney of corporations whose stocks, bonds, or other securities may form a part of my estate, or any trust fund, and may be compensated for such service by such corporations.

ARTICLE TWENTY-SEVENTH. I hereby will and direct that any reference contained in this my last Will and Testament to my executors or to my trustees shall be deemed and construed to refer with equal force to the survivor or survivors of any of my executors or to the survivor or survivors of any trustees of any trust fund herein mentioned, and to any additional executors or trustees when their appointment is effected. And I hereby nominate, constitute and appoint my son, Seymour H. Knox, to be one of the executors of this my last Will and Testament and one of the trustees of every trust herein created upon his reaching the age of twenty-one (21) years and with the same force and effect as though he were now included as an executor and as a trustee of each of the trusts hereby created, and subject to the

same provisions as to compensation as herein provided for my executors, other than my wife and the Bankers Trust Company of Buffalo.

174 ARTICLE TWENTY-EIGHTH. The provisions herein contained for the benefit of my said wife, Grace M. Knox, are to be accepted by her in lieu of any dower or right of dower in any real property of which I may die seized or possessed, or in which I may have any interest, and are also to be received by her in lieu of any right to receive fees, commissions, or other compensation as executrix of this my last Will and Testament.

ARTICLE TWENTY-NINTH. I hereby will and direct that no one of my children shall be charged with any advance or advancements made by me to such children during my lifetime.

ARTICLE THIRTIETH. It is my desire, if my executors approve, that all of my trotting-bred horses, harnesses, and sulkies, used in connection therewith, owned by me at the time of my death, excepting only such as may be selected by Benjamin F. White, pursuant to the provisions of Article Eighth hereof, be sold by my executors at the Easig-Tipton Sales in New York City.

ARTICLE THIRTY-FIRST. I will and direct that the income on the trusts created by Article Twenty-first of this will shall commence from the time of my death, and I authorize and direct my executors to make payments on account of said income in their discretion prior to the creation of the trusts, which payments shall be accepted by the beneficiaries in lieu of corresponding payments from the trustees.

ARTICLE THIRTY-SECOND. I direct that my executors be not required to file any inventory of my said estate.

I direct my executors to make, from time to time, at the request of any of the beneficiaries of any of the trusts herein created, semiannual statements certified by them, showing 175 as to each beneficiary the condition of the trust estate in which he or she is interested, and the receipts, disbursements, sales, and investments in connection therewith.

ARTICLE THIRTY-THIRD. I hereby nominate, constitute, and appoint my wife, Grace M. Knox, to be the Testamentary Guardian of my three children, Dorothy Knox, Seymour H. Knox, and Marjorie Knox.

ARTICLE THIRTY-FOURTH. In case for any reason any legacy or devise herein contained shall lapse or shall become, for any reason whatever, incapable of performance, then and in that event, I give, devise, and bequeath such legacy and devise of real estate, in case any part of it shall consist of real estate, to my said wife, Grace M. Knox, knowing that she will, so far as possible, carry out my express desires in relation to the same.

ARTICLE THIRTY-FIFTH. I hereby revoke and forever annul any and all other will or wills and codicils thereto by me at any time made.

In witness whereof, I have hereunto set my hand and seal this twelfth day of May, in the year of our Lord one thousand nine hundred and fifteen (1915).

SEYMOUR H. KNOX. [SEAL]

The foregoing instrument, consisting of twenty-three (23) pages, was on the day of the date thereof, signed, sealed, published, and declared by the Testator therein named, as and for his last Will and Testament, in the presence of us and each of us, who at his request and in his presence and in the presence of each other, have hereunto set our names as attesting witnesses thereto.

DAN'L J. KENEFICK,  
*Residing at Buffalo, N. Y.*

GUY WELLMAN,  
*Residing at Buffalo, N. Y.*

CHARLES H. TAYLOR,  
*Residing at Buffalo, N. Y.*

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*Respondent's exhibit A*

At a Surrogate's Court held in and for the County of Erie, State of New York, at the Surrogate's Office, in the City of Buffalo, in said County, on the 24th day of May 1921.

Present: Hon. LOUIS B. HART, Surrogate.

In the Matter of the Judicial Settlement of the Accounts of Grace M. Knox, Henry D. Knox, and Walter P. Cooke, as Executors of the Last Will and Testament of Seymour H. Knox, Deceased.

Grace M. Knox, Henry D. Knox, and Walter P. Cooke as Executors of the Last Will and Testament of Seymour H. Knox, late of the City of Buffalo, in said county, deceased, having heretofore presented to this court their petition praying for a judicial settlement of their accounts as such executors, dated December 20, 1920, and this court having thereupon duly issued a citation requiring the persons interested in the estate of said deceased named in said petition to be and appear in this court on the 1st day of February 1921, at ten o'clock in the forenoon of that day and attend the judicial settlement of the account of the said executors.

178 And satisfactory proof having been filed of the due service of said citation personally within the State on Dorothy Knox Goodyear, Seymour H. Knox, Marjorie Knox, and Grace M. Knox as appears by the affidavit of William C. Warren, Jr., verified the 7th day of January 1921, presented to and filed with this court, and said petitioners having presented to and filed with this court an instrument in writing signed by Burtis L. Knox, legatee, and a person interested in the estate of said deceased, acknowledged and approved as required by law, in which he waives the issue and service on him of a citation to attend said judicial settlement and consents to the making of this decree;

And Louis E. Desbecker, Esq., counselor at law, having been duly appointed special guardian for said Marjorie Knox, infant, by an order duly made in this proceeding by this court, and said Louis E. Desbecker having executed his written consent, to act as such special guardian, and having verified the usual affidavit of his ability to act as such special guardian and said consent and affidavit having been duly filed with said court in this proceeding, and this proceeding having been duly and regularly adjourned to this day and this day appeared the said petitioners in person and by Daniel J. Kenefick Esq., their attorney, and said Marjorie Knox having appeared by said Louis E. Desbecker, her special guardian, and by Grace M. Knox, her mother and guardian, and said Grace M. Knox, Henry D. Knox, and Walter P. Cooke as such executors having presented and filed their account, together with vouchers in support thereof, and said Louis E. Desbecker having executed his consent and recommendation in writing to the effect that the account submitted by the executors should be passed and judicially settled as filed

179 and that this decree submitted to him is in all respects satisfactory, which consent and recommendation is hereto attached and made a part of this decree.

Now on motion of Daniel J. Kenefick, Esq., attorney for said executors, and after hearing the proofs and allegations of the parties and examining said account and due deliberation having been had thereon,

I. It is ordered, adjudged, and decreed that the account of said Grace M. Knox, Henry D. Knox, and Walter P. Cooke as such executors, dated December 20, 1920, be and the same hereby is finally and judicially settled and allowed as filed and the Surrogate makes and records the following summary thereof:

The executors are debited and credited as follows:

## DEBIT

With amount of Schedule A----- \$26,233,760.31

## CREDIT

With amount of Schedule B-----	\$20,671,098.49	
With amount of Schedule C-----	1,172,186.00	
With amount of Schedule D-----	551,755.95	
With amount of Schedule E-----	3,493,406.83	25,888,447.27
		<hr/>
		\$345,313.04

II. And it is further ordered that out of said balance the said executors pay to Louis E. Desbecker, Esq., the said special guardian, the sum of \$5,000.00 hereby awarded him in full of his compensation for services rendered in this proceeding.

180 III. And it appearing to the satisfaction of this court that the executors were authorized and directed by Article Second of the will of the testator to cause to be erected in Forest Lawn Cemetery in the City of Buffalo, N. Y., a suitable monument and mausoleum at an expense of not exceeding \$50,000, and that pursuant to said authority and direction, the executors have caused to be erected in Forest Lawn Cemetery in the City of Buffalo, N. Y., a mausoleum at an expense of \$25,345.83,

It is ordered, adjudged, and decreed that the action of the executors in causing said mausoleum to be erected and in expending thereof the sum of \$25,345.83 be and the same hereby is ratified and approved.

IV. And it appearing to the satisfaction of this court that the testator by the Eleventh clause of his will bequeathed to the Methodist Episcopal Church located at Russell, St. Lawrence County, New York, fifty shares of the common capital stock of F. W. Woolworth Company in trust for the following purposes, the shares of stock so bequeathed to be held or sold and the proceeds invested and from time to time reinvested and the net income thereon used to assist in defraying the current expenses of said church; and that in accordance with said request the executors on or about the 14th day of March 1916, transferred fifty shares of the common capital stock of the F. W. Woolworth Company to The Board of Trustees of the Methodist Episcopal Church of Russell, N. Y., upon said corporation entering into an agreement under seal to hold the same in trust for the purpose and upon the terms and conditions set forth in Article Eleventh of the will of the testator,

181 It is ordered, adjudged, and decreed that the action of the executors in transferring and delivering said stock to said corporation upon its executing said agreement, be and the same hereby is ratified and approved.

V. And it appearing that by the Fifth Article of the will of the testator, he had bequeathed an annuity of \$1,200 per year to his brother, Burtis L. Knox, and directed his executors to pay over said annuity to said Burtis L. Knox in quarterly payments of \$300 during his natural life, and that the testator directed his executors to set aside the sum of \$30,000 for the purpose of producing said annuity and that at the death of said Burtis L. Knox, the testator devised and bequeathed the property so set aside to produce said annuity to his son, Seymour H. Knox, if he be then living, if not, to his daughters, Dorothy Knox and Marjorie Knox, to be divided between them share and share alike; and that he further provided that notwithstanding the foregoing provisions, in case said Burtis L. Knox should be living on the 1st day of January 1933, that in that event all the property held to provide such annuity should become the property of said Burtis L. Knox.

It is further ordered, adjudged, and decreed that said executors be and they hereby are ordered and directed to set aside \$30,000 and to hold and invest the same for the purposes and upon the terms and conditions set forth in Article Fifth of the will of the testator and that such sum be deemed to have been set aside as of the death of the testator and the annual payment of \$1,200 made in each year by the executors to said Burtis L. Knox shall be accepted by him with the same force and effect as though paid for the income derived from said sum of \$30,000.

182 VI. The Surrogate notes that the trustees of the various trusts created by the will of the testator, including Seymour H. Knox, now of full age, have duly executed their oaths and consents to act as trustees of the several trusts, and that the same are on file in this court, and that Seymour H. Knox, having become of age has qualified as executor by executing his oath of office which is on file in this office.

VII. And it appearing from the account to the satisfaction of this court that the total amount of income received by the executors from the time of their appointment to the date of said account is \$6,366,973.35, and that the expenses of administration, executors' compensation, taxes, etc., properly deductible therefrom amount to \$538,912.36 leaving a net income of \$5,828,860.99; and it further appearing that of said amount the sum of \$1,109,896.89 represents income on the bank stock specifically bequeathed in trust for Seymour H. Knox by paragraph C of Article Twenty-

first of the will of the testator; and it further appearing that the balance of the net income after deducting an annuity of \$1,200 per year payable to Burtis L. Knox should be divided as follows: Grace M. Knox, 40%; Dorothy Knox Goodyear, 20%; Seymour H. Knox, 20%; and Marjorie Knox, 20%; and that during the period embraced in this accounting the whole of said income has not been so distributed and that the said parties are entitled to interest on the undrawn portion of their distributive shares thereof as follows:

Seymour H. Knox	\$141,105.49
Grace M. Knox	56,453.48
Dorothy Knox Goodyear	46,789.79
Marjorie Knox	71,335.98
Total	\$315,684.72

183 which said amount, together with said sum of \$1,109,896.89 payable to Seymour H. Knox as aforesaid, should be deducted from said net income, leaving a balance of \$4,402,479.38 to be distributed as follows:

40% to Grace M. Knox	\$1,760,991.75
20% to Seymour H. Knox	880,495.87
20% to Dorothy Knox Goodyear	880,495.88
20% to Marjorie Knox	880,495.88

And it further appearing that the payments on account of income during the period covered by this accounting are as follows:

Grace M. Knox	\$1,319,979.39
Seymour H. Knox	689,105.68
Dorothy Knox Goodyear	449,774.67
Marjorie Knox	260,422.11

And it further appearing that during the period covered by this accounting the executors have expended certain moneys for bank stocks for Seymour H. Knox having in his behalf exercised certain rights to purchase stock coming to them by virtue of the holdings of stocks specifically bequeathed for him and that the amount of money so invested less the cash distribution of principal received by virtue of said holdings, amounts to \$41,512.98, which should be deducted from income due him.

And it further appearing that the amount now due to each of said interested parties on account of income to the date of the report is as follows:

184 Grace M. Knox 40% of net income	\$1,760,991.75
Interest	56,453.48
	1,817,445.23
Less amount drawn	1,319,979.39
Balance due	497,465.84

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Seymour H. Knox 20% of net income-----	\$880,495.87
Interest on undrawn income-----	141,105.49
Bank dividends-----	1,109,898.89
	<hr/>
Less amount drawn-----	2,131,498.25
	<hr/>
Balance-----	1,462,392.59
Less bank investments-----	41,512.98
	<hr/>
Balance due-----	1,420,879.61
	<hr/>
Dorothy Knox Goodyear 20% of net income-----	880,495.88
Interest on undrawn income-----	46,789.79
	<hr/>
Less amount drawn-----	927,285.67
	<hr/>
Balance due-----	449,774.67
	<hr/>
Marjorie Knox 20% of net income-----	880,495.88
Interest on undrawn income-----	71,335.96
	<hr/>
Less amount drawn-----	951,831.84
	<hr/>
Balance due-----	260,422.11
	<hr/>
Balance due-----	691,409.73

185 It is further ordered, adjudged, and decreed that the executors pay to Grace M. Knox, Seymour H. Knox, Dorothy Knox Goodyear, and Marjorie Knox, the above mentioned balances in full of all unpaid income and interest thereon due to the date of this accounting and that up to the sum of \$477,511, being the lowest amount of said income payments due, the executors pay the same by transferring and delivering to the parties entitled thereto bonds belonging to the estate at their appraised value or cost, and that the balance of said amounts be paid in cash or at the election of the parties entitled to receive said payments in securities at their appraised value or cost, but at no lesser value than present market.

And it is further ordered, adjudged, and decreed that the above balance of \$691,409.73 directed to be paid to Marjorie Knox be paid to Henry D. Knox, Walter P. Cooke, and Seymour H. Knox as Trustees for Marjorie Knox, and that the same be paid \$477,511 in bonds and the balance in cash or securities as hereinabove directed.

VIII. And it appearing to the satisfaction of this Court that the sales, purchases, and exchanges of properties and securities made by executors during the period embraced by this account were in accordance with the authority vested in them by the will of the testator, and were also to the best interest of said estate and the persons interested therein,

It is ordered, adjudged, and decreed that the action of the executors in making the various exchanges, purchases, and sales of properties and securities as set forth in said account be and the same hereby are ratified and approved.

186 IX. And it is further ordered, adjudged, and decreed that all payments of income made by the executors or herein directed to be made by them, shall be construed to be and shall be accepted by the various interested parties as payments of income on account of their respective interests in the estate and in the trusts created for their benefit with the same force and effect as though paid to them by the Trustees named in said Last Will and Testament of Seymour H. Knox, deceased, and said trustees shall be and they hereby are relieved and exonerated from paying to the said interested parties any income on said trusts funds for the period covered by said account.

X. And it appearing by Article Twenty-fourth of the will of the testator that it was the wish of the testator that the property known as 416-418 Main Street in the City of Buffalo, New York, should become a part of the trust created for the benefit of Dorothy Knox Goodyear, and that the property known as 446-448 Main Street, Buffalo, N. Y., should become a part of the trust created for the benefit of Marjorie Knox,

It is ordered, adjudged, and decreed that the executors transfer and convey to Henry D. Knox, Walter P. Cooke, and Seymour H. Knox, as Trustees for the benefit of Dorothy Knox Goodyear, pursuant to the provisions of paragraph B of Article Twenty-first of said will said property known as 416-418 Main Street in the City of Buffalo, New York, at the value of \$414,000, being the appraised value thereof.

And it is further ordered, adjudged, and decreed that the executors transfer and convey to Henry D. Knox, Walter  
187 P. Cooke, and Seymour H. Knox as trustees for the benefit of Marjorie Knox, pursuant to the provisions of paragraph D of Article Twenty-first of said will said property known as 446-448 Main Street in the City of Buffalo, N. Y., at the value of \$464,439.89, being the appraised value of said property plus the cost of improvements made by the executors.

XI. It is further ordered, adjudged, and decreed that the executors in their discretion distribute the balance of the real estate in their hands at the appraised value of the several parcels between the trusts created for the benefit of Grace M. Knox by the provisions of paragraph A of Article Twenty-first of the will of the testator and the trust created for the benefit of Seymour H. Knox pursuant to the provisions of Paragraph C of Article Twenty-first of the will of the testator.

And it is further ordered, adjudged, and decreed that the executors on conveying the real estate to the various trusts or so much as they may determine to convey to the trusts, shall concurrently therewith transfer to the trustees of each of said four trusts, sufficient securities belonging to the estate at their appraised value or cost to equalize the difference in the value of the parcel or parcels of real estate received by each of said trusts, to the end that the appraised value of such real estate and such securities so transferred to equalize such value shall be equal as to each of such trusts except that the trust created for the benefit of Grace M. Knox shall be twice the amount of either of the others.

XII. And it appearing further that the testator by the provisions of Article Twenty-fifth of his said will has authorized and empowered his executors in the administration  
188 of his said estate to determine and make division of his property and estate among the various trust funds created by the provisions of Article Twenty-first thereof as in their judgment shall seem wise and proper.

It is further ordered, adjudged, and decreed that the executors shall from time to time as in their judgment seems wise and proper, make division of the property and estate remaining in their hands, or so much thereof as from time to time they think wise, after making provision for carrying out the terms and conditions of this decree into the various trust funds created by the provisions of said last will and testament and in accordance with the terms thereof, any balance of cash or property remaining in the hands of the executors to be subject to the payment therefrom of any further debts or obligations of the testator and the expenses of administration and final distribution in accordance with the terms of said will.

And it is further ordered, adjudged, and decreed, that from and after the creation of said trust funds the executors and trustees may in their discretion apportion the expenses of administration and the other disbursements among the four trusts hereinbefore mentioned and the estate, so long as any portion of said estate remains undivided.

The Surrogate notes that the executors have this day filed in this court receipts and releases duly executed by the following named legatees showing full payment of the several specific bequests to them contained in the will of the testator: Henry D. Knox, Burtis L. Knox, Catherine Avery, The Home of the Friendless, the Charity Organization Society of Buffalo,  
189 Buffalo Fine Arts Academy, William T. Damon, Sey-

mour K. Fowler, Sherman Damon, Charles Knowlton, Bertha L. Daigler, Lucy Kranichfeld, Margaret Reilly, Benjamin F. White, (2) Paul J. Kingston, John Thoman, William Timm, Herman Timm, Edward Kingston, Louis Sissler, Charles Curtis, Charles Sissler, Aloise Burghardt; also receipt and release duly executed by Henry D. Knox, General Guardian of Pricilla Knox, Alice Knox, and James H. Knox, showing full payment of the specific bequests to them contained in the will of the testator; also receipts and releases duly executed by Bankers Trust Company of Buffalo and Walter P. Cooke, as trustees, showing the receipt by them of the property bequeathed in trust by the will of the testator for Verona Knox, Ethel Knox, Carrie D. Fowler, and Raymond P. Fowler; also receipt and release executed by the Board of Trustees of the Methodist Episcopal Church of Russell, N. Y., showing the receipt of the property specifically bequeathed in trust by the will of the testator; together with an agreement executed by the Board of Trustees of the Methodist Episcopal Church of Russell, N. Y., to hold said property in trust in accordance with the terms of the will of the testator.

L. B. HART, *Surrogate*.

STATE OF NEW YORK,

*County of Erie, Surrogate's Office, ss.:*

I, George T. Vandermeulen, Clerk of the Surrogate's Court of the said county of Erie, do hereby certify that I have compared the foregoing and annexed copy of Decree—in the 196 matter of the judicial settlement of the accounts of Grace M. Knox, Henry D. Knox, and Walter P. Cooke, as executors of the Last Will and Testament of Seymour H. Knox, deceased, with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom, and of the whole of such original record.

[SEAL]

In witness whereof, I have hereunto set my hand and affixed the seal of said Surrogate's Court, at Buffalo, N. Y., this 12th day of December 1938.

No. 53273.

G. T. VANDERMEULEN  
*Clerk of Surrogate's Court.*

[Surrogate's Court, Erie County. In the Matter of the Judicial Settlement of the Accounts of Grace M. Knox and others as executors of vs. Seymour H. Knox, Deceased. Decree.]

112 GUY T. HELVERING VS. MARJORIE K. CAMPBELL

191 Before United States Board of Tax Appeals

MARJORIE K. CAMPBELL, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

Docket No. 84639. Promulgated May 19, 1939

1. Basis.—Personal property, not specifically bequeathed to a taxpayer but distributed to her from a trust created by and in accordance with the will of her father, takes as its basis for gain or loss in her hands its fair market value at the time of the distribution, regardless of whether it was owned by the father at the date of his death, purchased by the executors, or purchased by the trustees. The third sentence of section 113 (a) (5) of the Revenue Act of 1932 applies and not the provisions of section 113 (a) (4) or the general provision of (a).

2. "First In, First Out."—Such property is not "first in," as compared with other like shares purchased by the taxpayer individually prior to the distribution, for the purpose of the first in, first out rule.

3. Wash Sales—Substantially Identical.—Bonds sold on one day and bonds purchased on the following day were not substantially identical within the meaning of section 118 of the Revenue Act of 1932, where there was a difference in their date of issuance of not less than four years and five months, a difference in their date of maturity of not less than five years and five months, a difference in the dates upon which interest was payable, a difference of 1% in the market price of the bonds, and where one lot of bonds was registered while the other bore coupons.

192 R. M. Andrews, Esq., John L. Kenefick, Esq., and Ernest J. Brown, Esq., for the petitioner. W. H. Schwatka, Esq., and E. L. Updike, Esq., for the respondent.

#### *Opinion*

MURDOCK: The Commissioner determined a deficiency of \$86,937.47 in the income tax of the petitioner for the calendar year 1933. The Board adopts as its findings of fact the stipulation filed by the parties, together with the respondent's exhibit A.

#### ISSUE I

The petitioner disposed of certain securities in the taxable year which she had received as a distribution from a trust set up by her father's will. The Board is asked to determine her basis

for gain or loss on those securities. She contends that the basis was the fair market value of the securities at the time they were distributed to her from the trust, whereas the Commissioner contends that her basis was the same as that of the trust, that is, cost to the trust of those purchased by the trust and fair market value at the date received by the trust of those which were transferred to the trust by the decedent's executors.

Seymour H. Knox, the father of the petitioner, died on May 16, 1915. His will provided that the residuary estate  
193 should be divided into four parts and that one part, consisting of 20 percent of the whole, should be placed in trust for this petitioner. The will provided with respect to the portion placed in trust for this petitioner that it was so placed for the following uses and purposes:

To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my said trustees shall seem wise and proper toward the support, maintenance and education of my daughter, Marjorie Knox, until she shall arrive at the age twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over the accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said daughter, Marjorie Knox, until she shall arrive at the age of twenty-eight (28) years, at which time, I give, devise, and bequeath to my said daughter, Marjorie Knox, one-half ( $\frac{1}{2}$ ) of the property then constituting said trust fund and I direct my said trustees, to pay over the net income on the remaining one-half ( $\frac{1}{2}$ ) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Marjorie Knox, and to her heirs and assigns forever.

In the event that my said daughter, Marjorie Knox, shall die before reaching the age of thirty-five (35) years, I give, devise, and bequeath any part or portion of said trust  
194 fund, which has not then been paid over to her, or to the possession of which, at the time of her death she was not entitled, unto the issue of said Marjorie Knox, if any, surviving her, to be divided among them, share and share alike. And in case there be no issue her surviving, then I give, devise, and bequeath said trust fund unto her heirs.

It is further provided that the trustees should have full power to sell, exchange, or dispose of any property in the trust fund,

and expressed the wish of the testator that within five years after his death, or as soon thereafter as possible, 50 percent of the value of the trust fund should be invested in securities constituting legal investments for executors or trustees or in unencumbered real property.

The trust was formally set up on July 1, 1921, and the executors on that date transferred to the trustees the property as provided in the will. The petitioner attained the age of twenty-eight years on July 10, 1928, and received on that date one-half of the property then constituting the trust fund. Certain of the securities which she received at that time were sold during 1933 and certain of the bonds matured and were paid during 1933. Some of the securities sold by her had been held by her father at the time of his death, others had been purchased by the executors, and still others had been purchased by the trustees. The Commissioner, in his determination of the deficiency, used as the basis for gain or loss for securities owned by the decedent at the time of his death, and for securities purchased by the executors, the fair market value thereof on July 1, 1921, and, in the case of securities purchased by the trustees, the cost thereof to the trustees.

The petitioner correctly contends that the proper basis is 195 the fair market value of the securities on July 10, 1928, when they were distributed to her pursuant to her father's will. She acquired the property in question by the will of her father. It was personal property and was not acquired by specific bequest. Section 113 (a) (5) of the Revenue Act of 1932 provides that the basis for gain or loss on such property is the fair market value of the property at the time of the distribution to the taxpayer. Section 113 (a) (4) by its express terms does not apply. Neither does the general rule of (a) apply. The question presented here has been decided adversely to the contention of the respondent in a number of cases, several of which have been reviewed and affirmed by the appellate courts. *Ralph W. Harbison*, 26 B. T. A. 896; *Mary Colgate*, 27 B. T. A. 506 (both of the above were reversed on other grounds, 293 U. S. 144); *Lillian McDonald Brinton*, 28 B. T. A. 472; *Harry G. Haskell*, 30 B. T. A. 855; *affd.*, 78 Fed. (2d) 869; *James W. Arrott, Jr.*, 34 B. T. A. 133; *Robert A. Taft, Trustee*, 34 B. T. A. 603; *affd.*, 101 Fed. (2d) 1007 (1/10/39); *Bessie C. Williamson*, 34 B. T. A. 668 and 924; *affd.*, 100 Fed. (2d) 735; *Margaret E. B. Fleming*, 36 B. T. A. 773; *Richard Van Nest Gambrell*, 38 B. T. A. 981; *Van Nostrand v. United States*, 18 Fed. Supp. 295; *affd.*, 94 Fed. (2d) 410; *Commissioner v. Libbey*, 100 Fed. (2d) 458. The respondent has filed a lengthy

and, thoughtful brief, but he does not distinguish the present case from the cases just cited, he is unable to cite any authority which was not fully considered in those cases, and he makes no argument which might cause the Board to change its position. Therefore, we follow the cited cases and hold for the petitioner.

## ISSUE II

The petitioner had certain securities which she had purchased prior to July 10, 1928. She received from the trustees  
196 on July 10, 1928, some more of the same kind of shares.

She sold some of the shares in 1933. She applied the "first in, first out" rule in making up her return for 1933 and regarded her individual purchases as the stock first purchased, used the basis applicable to those shares until it was exhausted, and then used as the basis for the remaining shares sold the fair market value of the shares on July 10, 1928. The Commissioner, in determining the deficiency, held that the first shares purchased were those received from the trustees since, as a matter of fact, they were purchased by the trustees prior to the date upon which the petitioner had purchased her similar shares.

The parties are in agreement that the first in, first out rule must be applied, since the shares which the petitioner sold cannot be identified as those purchased at any particular time. They disagree, however, as to which stock was the "first in." The rule appears in the regulations, not in the statute, and provides that "when shares of stock in a corporation are sold from lots purchased at different dates or at different prices and the identity of the lots cannot be determined, the stock sold shall be charged against the earliest purchases of such stock." Neither party has suggested any statutory provision which has any bearing upon the question. There are provisions in section 101 (c) (8) defining capital assets which state that the period for which a taxpayer has held property shall include, under certain circumstances, the period during which it was held by a prior owner. None of those provisions, either by their purpose or by their express wording, would have any application to the stock in question. The rule should receive a practical and reasonable application. It means purchased by the particular taxpayer. A person  
197 should not be deemed to have purchased property prior to the time that he purchased it or acquired the title to it, unless there is some express statutory provision to that effect. The estate of the decedent and the trust are governed by the laws of the State of New York. The petitioner has pointed out that she did not acquire any vested interest in the trust property until it was distributed to her on July 10, 1928.

Certainly she had not acquired the particular shares and she did not hold those shares prior to that date. The Commissioner has apparently proceeded on the theory that purchase by the trust was, for tax purposes, purchase by the petitioner. He has attributed to the petitioner the same basis that the trust would have had, and he has attributed to the petitioner the period of holding that the trust had. He may have been consistent in that. The trust, however, was a separate taxable entity and must be kept separate from this petitioner in the absence of any statutory provision to the contrary. It had complete ownership of these shares up to the very moment of the distribution. We have held that the basis for gain or loss on the shares was not that of the trust, but was the fair market value of the shares at the time they were distributed by the trust to the petitioner. The second contention of the respondent must fall with the first. The date of "purchase" of those shares by the petitioner for the purpose of applying the first in, first out rule was July 10, 1928. Cf. *Helvering v. San Joaquin Fruit & Investment Co.*, 297 U. S. 496. Decision on this point is for the petitioner.

### ISSUE III

The petitioner purchased \$25,000 face amount of the corporate stock of the city of New York on December 29, 1932. Such so-called stock is, for all present purposes, the equivalent of bonds.

It was issued on May 1, 1907, will mature on May 1, 1957, and paid interest at the rate of  $4\frac{1}{2}$  percent semiannually on May 1 and November 1. She purchased a like amount of somewhat similar stock on the same day, the difference being that the second lot were issued on November 1, 1908, and will mature on November 1, 1967. Each purchase consisted entirely of registered securities. She sold both lots of stock on December 22, 1933.

She purchased on the following day \$10,000 face amount of the corporate stock of the city of New York issued May 1, 1907, maturing on May 1, 1957, paying interest at the rate of  $4\frac{1}{2}$  percent semiannually on May 1 and November 1. She concedes that this purchase was of substantially identical stock or securities and that the wash sales provision of section 118 of the Revenue Act of 1932 applies.

She purchased on December 23, 1933, an additional \$50,000 face amount of the corporate stock of the city of New York. The stock involved in this purchase was issued on March 1, 1913. It matures on March 1, 1963. Interest at the rate of  $4\frac{1}{2}$  percent thereon was payable on March 1 and September 1 of each year.

These bonds were coupon bonds. The Commissioner, in determining the deficiency, held that they were substantially identical securities to those sold on the previous day and he disallowed the entire loss which the petitioner realized from the sales made on December 22.

The petitioner contends that there was no wash sale in regard to \$40,000 face amount of the bonds which she sold on December 22 because the \$50,000 face amount of bonds purchased on December 23 were not substantially identical stock or securities to any of those sold. She points to the following differences between the bonds:

1. A difference in the date of issuance—five years and ten months in the one case and four years and five months in the other.

199 2. A difference in date of maturity—five years and ten months in one case and five years and five months in the other.

3. A difference in the dates upon which interest was paid, from May and November to March and September.

4. The bonds sold were registered, while those purchased bore coupons.

5. A difference of  $1\frac{3}{8}$  in the market price of the bonds on December 23.

She cites I. T. 2672, C. B. XII-1, p. 72, wherein the Treasury ruled that bonds having different dates of issue, different dates of interest payments, different dates of maturity, and different unit values, although otherwise similar, are not substantially identical securities within the meaning of section 118 of the Revenue Act of 1932. The Commissioner cites no authority which is directly in point or even closely analogous. His argument is not supported by the facts and is mostly irrelevant. The petitioner points out that in *Marie Hanlin*, 38 B. T. A. 811, the Board entered into a lengthy discussion of the meaning of "substantially identical stock or securities" and went so far as to hold that bonds having a difference of only two and one-half years in dates of maturity, but redeemable at the option of the obligor at any time after about six months, were substantially identical, but said:

"If there was an unconditional positive difference of two and one-half years in the maturity or redeemability of the bonds a more difficult question as to the substantiality of the difference might arise."

200 The differences between the bonds here in question were greater than the differences between the bonds involved in the *Hanlin* decision, and that difference serves to distinguish

118 GUY T. HELVERING VS. MARJORIE K. CAMPBELL,

the two cases. Section 118 does not apply and the petitioner is entitled to deduct the loss sustained from the sale of \$40,000 face amount of the bonds.

Reviewed by the Board.

Decision will be entered under Rule 50.

201 Before United States Board of Tax Appeals

Docket No. 84639

[Same title.]

*Decision*

The respondent on June 13, 1939, filed a proposed computation pursuant to the Board's Opinion promulgated May 19, 1939. The petitioner on June 23, 1939, filed a notice of acquiescence to the respondent's computation. Therefore, it is

Ordered and decided, that there is no deficiency in income tax for the year 1933.

[SEAL]

(Signed) J. E. MURDOCK,

*Member, United States Board of Tax Appeals.*

Enter:

Entered June 30, 1939.

*U. S. Board of Tax Appeals.*

Filed Sept. 22, 1939.

202 In United States Circuit Court of Appeals for the  
Second Circuit

B. T. A.—Docket No. 84639

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,  
PETITIONER ON REVIEW

v.

MARJORIE K. CAMPBELL, RESPONDENT ON REVIEW

*Petition for review and assignments of error*

*To the Honorable Judges of the United States Circuit Court of  
Appeals for the Second Circuit:*

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Sammuell O. Clark, Jr., Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Claude R. Marshall, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

## I

## JURISDICTION

That the petitioner on review (hereinafter referred to as the Commissioner) is the duly appointed, qualified, and acting Commissioner of Internal Revenue, appointed and holding his office by virtue of the laws of the United States; that the  
203 respondent on review (hereinafter referred to as the taxpayer), is an individual and is a resident of the village of East Aurora, New York; that the said Marjorie K. Campbell filed her Federal income tax return for the taxable year 1933 in the office of the Collector of Internal Revenue for the 28th District of New York, located at Buffalo, New York, which said district is within the jurisdiction of the United States Circuit Court of Appeals for the Second Circuit.

The Commissioner seeks a review of the decision of the United States Board of Tax Appeals by virtue of the provisions of the Revenue Act of 1926, Sections 1001-1005, c. 27, 44 Stat. 9, as amended by the Revenue Act of 1928, Section 603, c. 852, 45 Stat. 873, and further amended by the Revenue Act of 1932, Section 1101, c. 209, 47 Stat. 169 and as further amended by the Revenue Act of 1934, Section 519, c. 277, 48 Stat. 680, and subsequent revenue acts.

## II

## PRIOR PROCEEDINGS

On February 27, 1936, the Commissioner of Internal Revenue, pursuant to the provisions of Section 272 (a) of the Revenue Act of 1932, as amended by Section 501 of the Revenue Act of 1934 (49 Stat. 755), sent the taxpayer by registered mail a notice of deficiency advising her that the determination of her income tax liability for the taxable year 1933 disclosed a deficiency in tax in the amount of \$86,937.47. Thereafter, on May 25, 1936, a petition was filed by the taxpayer with the United States Board of Tax Appeals requesting a redetermination of the deficiency determined in the aforesaid notice of deficiency. On July 24, 1936, the Commissioner filed  
204 an answer to the petition, wherein he affirmatively claimed an increased deficiency. On September 3, 1936, the taxpayer filed her reply. On December 12, 1938, the taxpayer filed a motion to file an amended petition and on the same day lodged an amended petition. The motion to amend the petition having been granted, the Commissioner on December 14, 1938, filed his answer to the amended petition.

This proceeding and the cases of Seymour H. Knox, B. T. A. Docket No. 77827, and Dorothy K. G. Rogers, B. T. A. Docket No. 84640, were heard on December 14, 1938, at Washington, D. C. On May 19, 1939, the Board promulgated its opinion (39-B. T. A.—No. 133), and on June 30, 1939, the Board entered its decision ordering and deciding that there is no deficiency in tax for the year 1933.

### III

#### NATURE OF CONTROVERSY

Seymour H. Knox, the father of the taxpayer, died on May 16, 1915. His will provided that the residuary estate should be divided into four parts and that one part, consisting of 20 per cent of the whole, should be placed in trust for this taxpayer. The will provided with respect to the portion placed in trust for this taxpayer that it was so placed for the following uses and purposes:

"To receive, hold and, from time to time, invest and reinvest the same, and to collect the rents, income, issues, and profits on the property from time to time constituting such trust fund and to pay over so much of the net income arising therefrom, as to my said trustees shall seem wise and proper toward the support, maintenance, and education of my daughter, Mar-

205 jorie Knox, until she shall arrive at the age of twenty-one (21) years, and to accumulate the balance of the income during her minority for her benefit, and to pay over the accumulated income to her when she shall arrive at the age of twenty-one (21) years, and thereafter to pay over the entire net income to my said daughter, Marjorie Knox, until she shall arrive at the age of twenty-eight (28) years, at which time, I give, devise, and bequeath to my said daughter, Marjorie Knox, one-half ( $\frac{1}{2}$ ) of the property then constituting said trust fund and I direct my said trustees to pay over the net income on the remaining one-half ( $\frac{1}{2}$ ) of said trust fund until she shall arrive at the age of thirty-five (35) years, at which time I give, devise, and bequeath the remaining part of said trust fund to my said daughter, Marjorie Knox, and to her heirs and assigns forever.

"In the event that my said daughter, Marjorie Knox, shall die before the age of thirty-five (35) years, I give, devise, and bequeath any part or portion of said trust fund which has not then been paid over to her, or to the possession of which at the time of her death she was not entitled, unto the issue of said Marjorie Knox, if any, surviving her, to be divided among them, share and share alike. And in case there be no issue her surviving,

then I give, devise, and bequeath said trust fund unto her heirs."

The will further provided that the trustees should have full power to sell, exchange, or dispose of any property in the trust fund, and expressed the wish of the testator that within five years after his death, or as soon thereafter as possible, 50 percent of the value of the trust fund should be invested in securities constituting legal investments for executors or trustees or in unencumbered real property.

206 The trust was formally set up on July 1, 1921, and the executors on that date transferred of record and delivered to the trustees the property as provided in the will. The taxpayer attained the age of twenty-eight years on July 10, 1928, and on that date one-half of the property then constituting the trust fund was transferred of record and delivered by the trustees to her. Certain of the securities which she received at that time were sold during 1933 and certain of the bonds matured and were paid during 1933. Some of the securities sold by her had been held by her father at the time of his death, others had been purchased by the executors, and still others had been purchased by the trustees.

The securities sold in 1933 by the taxpayer included the following:

(1) 840 Shares common stock of U. S. Steel Corporation; 204 Shares common stock of the American Telephone & Telegraph Company; \$25,000 face amount  $4\frac{1}{2}\%$  bonds, Federal Land Bank of Louisville, due 1953; \$8,000 face amount  $4\frac{1}{2}\%$  bonds Federal Land Bank of Columbia, due 1955.

(2) 104 Shares of common stock of The Atchison, Topeka & Santa Fe Railway Company.

(3) \$10,000 face amount Corporate Stock ( $4\%$  of May 1, 1959) City of New York; 125 Shares common stock of Southern Pacific Company; 320 Shares common stock of Hotels Statler Company, Inc.; 100 Shares common stock of Union Pacific Railroad Company.

257 (4) \$50,000 face amount ( $4\%$  of 1946) bonds of the City of Philadelphia; \$10,000 face amount ( $4\frac{3}{4}\%$  of January 1, 1933) bonds of City of Auburn; \$20,000 face amount ( $4\frac{1}{2}\%$  of January 15, 1933) bonds of City of Rochester.

(5) 500 Shares of common stock of Niagara Hudson Power Corporation; 1 Option warrants of Niagara Hudson Power Corporation; 300 Shares of Preferred Stock of Buffalo Niagara & Eastern Power Corporation.

(6) 10,000 Shares of common stock of F. W. Woolworth Company.

The taxpayer contended that in accordance with the third sentence of Section 113 (a) (5) of the Revenue Act of 1932, her basis in every instance for determining gain or loss on the disposition of said property is the fair market value of the securities on the date of delivery to her by the trustees on July 10, 1928.

The Board held that the securities were personal property acquired by the will of her father and not by specific bequest, and that the third sentence of Section 113 (a) (5) of the Revenue Act of 1932 applies and not the general provisions of Section 113 (a) or Section 113 (a) (4), and that the proper basis of the securities in the hands of the taxpayer for gain or loss is their market value of the securities on the date physically delivered to the taxpayer by the trustees on July 10, 1928.

The Commissioner presents that in respect to the securities purchased by the trustees the bases of such securities to the taxpayer were their respective cost to the trustees, as provided by Section 113 (a) of the Revenue Act of 1932; that in respect to the securities purchased by the executors, that the bases to the taxpayer of such securities were their respective cost to the executors, as provided by Section 113 (a) of the Revenue Act of 1932, and in the alternative, if Section 113 (a) (5) of said Act governs, as contended by the taxpayer, then the bases to the taxpayer of such securities were their respective fair market values at the time they were formally transferred from the executors to the trustees on July 1, 1921, and not the time the securities were physically delivered to the taxpayer by the trustees. In respect to the securities owned by the taxpayer's father at the date of his death, the Commissioner presents that the bases to the taxpayer of such securities were the fair market value of such securities at the time of death of taxpayer's father, as provided by Section 113 (a) (4) of the Revenue Act of 1932, and in the alternative, if Section 113 (a) (5) of the Revenue Act of 1932 governs, as contended by the taxpayer, the bases to the taxpayer of such securities were their fair market values at the time of their formal transfer from the executors to the trustees and not the time the securities were physically delivered to the taxpayer by the trustees.

The position of the Commissioner may be summarized in respect to the securities listed above as follows:

1. That Section 113 (a) of the Revenue Act of 1932 is applicable in determining the cost basis of the securities purchased by the executors and trustees, which is cost to them and is applicable to such securities as were thus acquired, as are listed under (1), (4), (5), and (6).

2. That Section 113 (a) (4) of the Revenue Act of 1932 is applicable in determining the cost basis of the securities owned by taxpayer's deceased father and transferred to the trust on July 1, 1921, which cost basis is the fair market value thereof as of May 16, 1915, the date of death of taxpayer's father and is applicable to such securities as were thus acquired, as are listed under (2), (3), and (6).

3. In the alternative, if Section 113 (a) (5) of the Revenue Act of 1932 is applicable, then the "time of distribution to the taxpayer" within the meaning of said Section of said Act is the date the executors distributed the stock and bonds involved to the trustees, which was July 1, 1921, and is applicable to securities listed in (2), (3), (4), (5), and (6).

The taxpayer had 1,000 shares of common stock of the F. W. Woolworth Company which she acquired prior to July 10, 1928, by purchase and by issuance of stock dividends thereon. On July 10, 1928, she received from the trustees 15,000 shares of the same kind of stock already owned, consisting of shares acquired by the trustees by purchase and primarily from the executors of taxpayer's father's estate, which were originally held at the time of decedent's death and increased by stock dividends or exchanges in recapitalizations. In May 1929, she exchanged the aforesaid shares for 40,000 shares of the F. W. Woolworth Company stock in a plan of recapitalization. In December 1933 the taxpayer sold 10,000 shares of said stock for \$391,462.25 and in her income tax return for 1933 claimed a capital loss of \$278,854.33 thereon.

As the shares sold could not be identified as those purchased at any particular date, she applied the "first in, first out" rule as prescribed by Article 600 (4) of Regulations 77 and regarded her individual purchases as the stock first purchased, using as a basis of cost the cost of the 1,000 shares purchased by her until it was exhausted, and then she used as a basis for the remaining shares sold the fair market value of the shares of such stock received by her from the trust on July 10, 1928. The Commissioner determined that the first shares purchased were those received from the trustees since, as a matter of fact, they were acquired by the trustees prior to the date upon which the taxpayer purchased her similar shares, and that Section 113 (a) (4) of the Revenue Act of 1932 is applicable in determining the cost of the 10,000 shares of stock sold, and that the basis of said shares is the fair market value on May 16, 1915, the date of death of taxpayer's father, of an equivalent number of shares of such stock as they then existed. In the event that Section 113 (a) (5) of the Revenue

Act of 1932 governs instead of Section 113 (a) (4), then it is presented that the "time of distribution to the taxpayer," as provided therein, of the stock from which the 10,000 shares were derived was July 1, 1921, the date such shares of stock were transferred of record and delivered to the trust by the executors.

The Board held that the trust was a separate taxable entity from the taxpayer and that the former had complete ownership and control of the shares up to the very moment of the distribution to the taxpayer, and that the date of "purchase" of those shares by the taxpayer for the purpose of applying the "first in, first out" rule was July 10, 1928.

The questions presented are:

(1) As to the securities purchased by the trustees with trust funds (subsequent to March 1, 1913), is the basis for determining gain or loss: (a) the cost to the trustees, or (b) the fair market value on the date of delivery by the trustees to the taxpayer?

211: (2) As to the securities purchased by the executors of the taxpayer's father's estate and turned over to the trustees as corpus of the trust, is the basis for determining gain or loss: (a) the cost to the executors, or (b) the fair market value on the date of delivery by the trustees to the taxpayer?

(3) As to the securities owned by the taxpayer's father at the time of his death (or the equivalent number of shares then existing) and turned over to the trustees as corpus of the trust, is the basis for determining gain or loss: (a) the fair market value thereof as of May 16, 1915, the date of death of taxpayer's father, or (b) the fair market value on the date of delivery by the trustees to the taxpayer?

(4) For determining the time of acquisition by the taxpayer in applying the "first in, first out" rule prescribed by Article 600 (4) of Regulations 77, is the time of "acquisition" in respect to the securities originally owned by the taxpayer's father at the time of his death (increased through subsequent distributions in reorganization) or an equivalent number of such shares as then existed and transferred as trust corpus on July 1, 1921, to be computed: (a) from date of death of grantor on May 16, 1915; (b) from the date the securities were formally transferred and delivered to the trust by the executors on July 1, 1921, or (c) the date of delivery by the trustees to the taxpayer on July 10, 1928?

(5) Was the taxpayer's interest "vested" or "contingent" under the laws of New York?

(6) In determining gain or loss under Section 113 (a) (5) of the Revenue Act of 1932, is the meaning of the phrase

212 "the fair market value of the property at the time of the distribution to the taxpayer"—(a) the date when the executors turned over the corpus of the trust to the trustees, or (b) the date of actual delivery by the trustees to the taxpayer?

#### IV

##### ASSIGNMENTS OF ERROR

That the Commissioner of Internal Revenue being aggrieved by the opinion and decision of the United States Board of Tax Appeals in these proceedings hereby petitions for a review of said opinion and decision by the United States Circuit Court of Appeals for the Second Circuit, and for the correction of the manifest errors which therein occurred and intervened to his prejudice. The errors committed by the Board, which are relied upon by the Commissioner as the basis of this petition for review, are as follows:

(1) In holding and deciding that personal property delivered by trustees from the trust created by and in accordance with the will of taxpayer's father takes, as its basis for gain or loss in the hands of the taxpayer, its fair market value at the time of the delivery to the taxpayer by the trustees—regardless of whether the property was owned by the father at the date of his death, purchased by the executors, or purchased by the trustees.

(2) In failing to hold and decide, where personal property was owned by taxpayer's father at the date of his death on May 16, 1915, and said property is transferred on July 1, 1921 to a testamentary trust created by and in accordance with the will of taxpayer's father and said property is physically delivered to the said taxpayer by the trustees on July 10, 213 1928, that the basis of said property for gain or loss in the hands of the taxpayer is the fair market value of such property at the time of the death of taxpayer's father.

(3) In failing to hold and decide, where personal property is purchased or acquired by the executors of taxpayer's father's estate and the said property is transferred on July 1, 1921, to a testamentary trust created by and in accordance with the will of the taxpayer's father and said property is physically delivered to the said taxpayer on July 10, 1928, by the trustees, that the cost basis of said property for gain or loss in the hands of the taxpayer is the same as the cost basis to the executors.

(4) In failing to hold and decide, where personal property is purchased or acquired by testamentary trustees of a trust created by and in accordance with the will of taxpayer's father and said property is physically delivered to said taxpayer on July 10, 1928, by the trustees, that the cost basis of said property

for gain or loss in the hands of the taxpayer is the same as the cost basis to the testamentary trustees.

(5) In holding and deciding that the basis for determining gain or loss of the personal property delivered by trustees from the trust created by and in accordance with the will of taxpayer's father is determined and governed by the third line of Section 113 (a) (5) of the Revenue Act of 1932.

(6) In failing to hold and to decide that the basis for determining gain or loss of the personal property delivered by trustees from the trust created by and in accordance with the will of taxpayer's father is determined and governed by the first sentence of Section 113 (a) of the Revenue Act of 1932,

214 where said property delivered by the trustees was acquired either by the trustees, or the executors before transfer to the testamentary trust.

(7) In failing to hold and to decide that the basis for determining gain or loss of the personal property delivered by trustees from the trust created by and in accordance with the will of taxpayer's father is determined and governed by Section 113 (a) (4) of the Revenue Act of 1932, where said property delivered by the trustees was held by the father at the date of his death on May 16, 1915, and transferred by the executors of the father's estate to the testamentary trustees.

(8) In holding and deciding that the "time of distribution to the taxpayer" within the meaning of Section 113 (a) (5) of the Revenue Act of 1932 is the date the trustees delivered the property as provided in the will to the taxpayer, to wit, July 10, 1928.

(9) In failing to hold and decide that "the time of distribution to the taxpayer" within the meaning of Section 113 (a) (5) of the Revenue Act of 1932 is the date the executors transferred the property as provided in the will to the testamentary trustees for the benefit of the taxpayer, to wit, July 1, 1921.

(10) In failing to hold and decide that the taxpayer realized gains and sustained losses on the disposition of the personal property physically received from the trustees on July 10, 1928, measured by the difference between the sales prices and bases claimed by the Commissioner on the respective properties disposed of in 1933.

(11) In that the decision of the Board is contrary to the position of the Commissioner outlined in General Counsel's Memorandum 14893 (1935), C. B. XIV-1, p. 202.

215 (12) In holding and deciding that the personal property delivered by trustees from the trust on July 10, 1928, created by and in accordance with the will of taxpayer's father, was not "first in" as compared with other like property pur-

chased by the taxpayer individually prior to the delivery to her by the trustees, for the purpose of the first in, first out rule prescribed by Article 600 (4) of Regulations 77.

(13) In holding and deciding that the taxpayer did not acquire any vested interest in the trust property set aside for her benefit under the terms of a will of her father creating to her prior to the date the said property was physically delivered to her by the trustees.

(14) In failing to hold and decide that the taxpayer acquired a vested interest in the trust property set aside for her benefit prior to the date the said property was physically delivered to her by the trustees.

(15) In holding and deciding that the basis for gain or loss on the property physically received from the trust on July 10, 1928, and disposed of together with like property purchased prior to said date, is the fair market value of said property at the time it was delivered by the trustees to the taxpayer, to-wit, July 10, 1928.

(16) In failing to hold and decide, for the purpose of applying the first in, first out rule prescribed by Article 600 (4) of Regulations 77, that the first shares of stock acquired by the taxpayer were those received from the trustees, since they were acquired by the trustees prior to the date upon which the taxpayer had purchased similar shares.

216 (17) In failing to hold and decide that the cost basis of 10,000 shares of stock of F. W. Woolworth Company sold by the taxpayer in 1933 should be determined by taking the fair market value on May 16, 1915, the date of death of taxpayer's father, of an equivalent number of shares of such stock as they then existed, as provided by Section 113 (a) (4) of the Revenue Act of 1932.

(18) In holding and determining that the taxpayer sustained a capital loss of \$278,854.33 on the sale of 10,000 shares of stock of F. W. Woolworth Company by first using as a cost basis the cost to taxpayer of 1,000 shares purchased by her and the fair market value of the shares of similar stock received by her from the testamentary trustees on July 10, 1928.

(19) In that its decision is contrary to the principle underlying the action of the United States Supreme Court in the case of *McFeely v. Commissioner* (1935), 296 U. S. 102.

(20) The Board erred in that its conclusions of law and findings of fact are without substantial evidence to support them.

(21) The Board erred in finding and determining that there is no deficiency in tax liability due from the taxpayer for the year 1933.

(22) The Board erred in failing to find and determine that there is a deficiency in tax liability due from the taxpayer for the year 1933 in the amount of \$90,000.00 or such greater amount as is determined to be due upon correction of the errors herein set forth.

217 Wherefore, the Commissioner petitions that said findings of fact and opinion and decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit; that a transcript of the record be prepared in accordance with the law and the rules of said court and be transmitted to the Clerk of said court for filing and that appropriate action be taken to the end that the errors herein complained of may be reviewed and corrected by said court.

(Sgd.) SAMUEL O. CLARK, Jr.,  
*Assistant Attorney General.*

(Signed) J. P. WENCHEL,  
R. L. W.  
J. P. Wenchel,  
*Chief Counsel,  
Bureau of Internal Revenue.*

Of Counsel:

CLAUDE R. MARSHALL,  
*Special Attorney,  
Bureau of Internal Revenue.*

218 [*Duly sworn to by Claude R. Marshall; jurat omitted in printing.*]

219 In the United States Circuit Court of Appeals For The  
Second Circuit

B. T. A. Docket No. 84639

[Same title.]

*Notice of filing petition for review*

Filed Sept. 30, 1939

To: ERNEST J. BROWN, Esq.,  
1330 Marine Trust Building,  
Buffalo, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22 day of September 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the

Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22 day of September 1939.

(Signed) J. P. WENCHEL,  
R. L. W.

J. P. Wenchel,  
*Chief Counsel,*  
*Bureau of Internal Revenue.*

220 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 26th day of September 1939.

ERNEST J. BROWN,  
*Attorney for Respondent on Review.*

CRM/csl.  
9/13/39.

221 In United States Circuit Court of Appeals for the  
Second Circuit

B. T. A. Docket No. 84639  
[Same title.]

*Notice of filing petition for review*

Filed Sept. 30, 1939

To JOHN L. KENEFFICK, Esq.,  
1330 Marine Trust Building,  
Buffalo, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22 day of September 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22 day of September 1939.

(Signed) J. P. WENCHEL,  
R. L. W.

J. P. Wenchel,  
*Chief Counsel,*  
*Bureau of Internal Revenue.*

130 GUY T. HELVERING VS. MARJORIE K. CAMPBELL

222 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 25th day of September 1939:

(Sgd.) JOHN L. KENEFICK,  
*Attorney for Respondent on Review.*

CRM/csl 9/13/39.

223 In United States Circuit Court of Appeals for the  
Second Circuit

B. T. A. Docket No. 84639  
[Same title.]

*Notice of filing petition for review*  
Filed Sept. 30, 1939

TO RALPH M. ANDREWS, Esq.,  
1330 Marine Trust Building,  
Buffalo, New York.

You are hereby notified that the Commissioner of Internal Revenue did, on the 22 day of September 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22 day of September 1939.

(Signed) J. P. WENCHEL,  
R. L. W.  
J. P. Wenchel,  
*Chief Counsel,*  
*Bureau of Internal Revenue.*

224 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 25th day of September 1939.

RALPH M. ANDREWS,  
*Attorney for Respondent on Review.*

CRM/csl.  
9/13/39.

225 In United States Circuit Court of Appeals for the  
Second Circuit

B. T. A. Docket No. 84639

[Same title.]

*Notice of filing petition for review*

Filed Sept. 30, 1939

To Mrs. MARJORIE K. CAMPBELL,  
East Aurora, New York:

You are hereby notified that the Commissioner of Internal Revenue did, on the 22 day of September 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 22 day of September 1939.

(Signed) J. P. WENCHEL,  
R. L. W.  
J. P. Wenchel,  
Chief Counsel,  
Bureau of Internal Revenue.

226 Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of error mentioned therein, is hereby acknowledged this 26th day of September 1939.

MARJORIE K. CAMPBELL,  
Respondent on Review.

CRM/csl.  
9/13/39.

227 In United States Supreme Court of Appeals for the Second  
Circuit

B. T. A. Docket No. 84639

[Same title.]

*Amended praecipe for record*

Filed Oct. 21, 1939

To the CLERK OF THE UNITED STATES BOARD OF TAX APPEALS:

You will please prepare, transmit, and deliver to the Clerk of the United States Circuit Court of Appeals for the Second

Circuit, copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the Second Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of proceedings before the Board.
2. Pleadings before the Board:
  - (a) Petition, including annexed copy of deficiency letter.
  - (b) Answer.
  - (c) Reply.
  - (d) Amended petition.
  - (e) Answer to amended petition.
  - (f) Reply to Answer to Amended Petition.
3. Stipulation of Facts and Exhibit A attached thereto.
4. Respondent's Exhibit A (Decree).

5. Findings of fact and opinion of the Board.
- 228 6. Decision.

7. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

8. Orders enlarging time for the preparation of the evidence and for the transmission and delivery of the record.

9. This praecipe (amended).

Said transcript to be prepared, certified, and transmitted as required by law and the rules of the United States Circuit Court of Appeals for the Second Circuit.

(Signed) J. P. WENCHEL,  
R. L. W.

J. P. Wenchel,

*Chief Counsel,*

*Bureau of Internal Revenue.*

Receipt of a copy of the above-described amended praecipe for record is acknowledged and agreed to this 19 day of October 1939.

JOHN L. KENEFICK,  
*Attorney for Respondent on Review.*

RALPH M. ANDREWS,

ERNEST J. BROWN,

*Attorneys for Respondent on Review.*

CRM/csl 10/17/39.

229 [Clerk's certificate to foregoing transcript omitted in printing.]

230 In United States Circuit Court of Appeals for the Second Circuit

Nos. 41-257-258-259—October Term, 1939

(Argued February 15, 1940. Decided June 10, 1940)

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

RICHARD VAN NEST GAMBRILL, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

MARJORIE K. CAMPBELL, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

SEYMOUR H. KNOX, RESPONDENT

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

DOROTHY K. G. ROGERS, RESPONDENT

231 Petitions by the Commissioner of Internal Revenue to review determinations of the United States Board of Tax Appeals in respect to income taxes of the respondents Gambrill and Knox for the year 1930, and of the respondents Campbell and Rogers for the year 1933. Affirmed.

Before SWAN, AUGUSTUS N. HAND, and PATTERSON, Circuit Judges.

Sewall Key, Acting Assistant Attorney General, J. L. Monarch and Newton K. Fox, Special Assistants to the Attorney General, Counsel for the Commissioner of Internal Revenue in the proceeding against the respondent Gambrill. Samuel O. Clark, Assistant Attorney General, Sewall Key and Arthur A. Armstrong, Special Assistants to the Attorney General, Counsel for the Commissioner of Internal Revenue in the proceedings against the respondents Campbell, Knox, and Rogers. Sidney W. Davidson,

Ben R. Clark, and Allin H. Pierce, Counsel for the respondent Gambrill. James McCormick Mitchell, John L. Kenefick, and Ralph M. Andrews, Counsel for the respondents Campbell, Knox, and Rogers.

232

*Opinion*

AUGUSTUS N. HAND, Circuit Judge:

The foregoing proceedings all involve the correctness of income tax assessments by the Commissioner of Internal Revenue and in each the Commissioner has appealed from decisions of the Board of Tax Appeals modifying his assessments.

In the Gambrill case the Commissioner assessed an income tax deficiency of \$11,753.40 for the year 1930, while the Board of Tax Appeals determined that there was an overpayment of \$75.60 by the taxpayer. In the Knox case the Commissioner assessed a deficiency for the same year of \$35,645.88 while the Board determined that there was a deficiency of \$42,842 (arising, however, from adjustments not here in issue). In the Campbell case the Commissioner assessed an income tax deficiency of \$86,937.47 for the year 1933, and in the Rogers case a deficiency of \$65,549.60 for the same year. The Board found that there was no income tax deficiency on the part of either Campbell or Rogers. We think that its orders in all four proceedings should be affirmed.

In each of the above cases the taxpayer involved was given a remainder interest in a trust created by will. Certain personal securities that were a part of the corpus of the particular trust were delivered by the trustee to the taxpayer after the right to possession became fixed by the termination of the prior beneficial estate. Some of these securities were acquired by the testator during his lifetime, some of them were purchased by the executor after the testator's death before setting up the trust, and some were purchased by the trustee after the trust was established. Securities derived by the trustee in the various ways mentioned were delivered by him to the taxpayer and sold by the latter.

233 In assessing income taxes upon alleged profits realized by the taxpayer the Commissioner used the following bases for computing gains: In the case of securities which had been owned by the decedent, their fair market value at the time when distributed by the executor to the trustee; in the case of securities purchased by the executor or trustee, the cost to such fiduciary; in respect to certain securities purchased by a fiduciary prior to March 1, 1913, as in Gambrill's case, the value on that date, whenever cost was unknown. The Board of Tax Appeals, however, took the view that, because of the provisions of Section 113 (a)

(5) of the Revenue Acts of 1928 and 1932, the proper basis in all cases was the fair market value of the securities at the "time of the distribution to the taxpayer" by the trustee, no matter when or how the trustee or the executor might have derived the particular securities.

In determining how long a taxpayer had held securities for the purpose of computing capital gain or loss under Section 101 of the Revenue Act of 1928 the Board used the dates of delivery of the securities by the trustee to the taxpayer. The Commissioner, on the other hand, used the date of the death of the testator as the beginning of the period of holding securities owned by the latter and the date of purchase by the fiduciary as the beginning in cases where securities were purchased by the executor or trustee.

We agree with the conclusion of the Board that Sections 113 (a) (5) of the Revenue Acts of 1928 and 1932 govern the computation of loss or gain in the cases before us. The pertinent provisions read as follows:

"(a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; except that—

\* \* \* \*

234 "(5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death; \* \* \*"

None of the securities involved in the cases before us were acquired "by specific bequest" or were "acquired by the decedent's estate from the decedent." They were all directly acquired

from testamentary trustees. Accordingly the basis was not "the fair market value of the property at the time of the death of the decedent." Therefore the third clause of Section 113 (a) (5) which embraces "all other cases" of property acquired by will is controlling. That clause provides that: "In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer."

235 The words "the property" in the foregoing sentence seem inevitably to relate to the particular property sold by the taxpayer to whom it was distributed by the trustee. The term "taxpayer" is defined by Section 701 (a) (13) of the Revenue Acts of 1928 and 1932 as "any person subject to a tax imposed by this Act." It is hard to imagine language which would more clearly fix the basis for computing the gain or loss realized upon the sales of the securities with which the Commissioner had to deal than the words "fair market value of the property at the time of the distribution to the taxpayer."

Perhaps the most strenuous objection made by the Commissioner to adopting what seems to be the clear meaning of the statute is that increment in value between the date of the decedent's death and the time of distribution to the taxpayer is not subjected to taxation when the securities are sold and thus tax resources are impaired. But it is frequently true that increments are not subjected to taxation. One common case where increment in value is disregarded is that which occurs during the lifetime of an owner of securities which are not sold by him but are sold after his death by his executors, administrators, trustees, or remaindermen under his will. Such an increment accruing during the lifetime of the owner of securities has never been taken into account in computing gain or loss upon sales after his death. Increment between the date of death of the owner of securities and the date of distribution by an executor to a legatee is also to be disregarded under the third clause of Section 113 (a) (5) in the case of distribution of securities which are transmitted by virtue of a general bequest.

The supposed loss in revenue due to a disregard of fluctuations in the market value of securities between the date of death and the time of distribution is moreover somewhat fanciful, for in all cases where the property depreciates in value between the date of death and the date of distribution a larger tax would result from fixing the basic value at "the time of the distribution to the taxpayer" than from fixing the basis at the time of the testator's death.

The further contention of the Commissioner that the word "taxpayer" as used in the third clause of Section 113 (a) (5)

should be construed as meaning the "trustee" and that the phrase "time of the distribution to the taxpayer" ought to be interpreted as meaning "the date when the executors transferred the property to the trustees," seems to us without warrant. The taxpayers here are undoubtedly the respondents. The trustees are separate entities and as such are neither agents of the respondents nor mere passive fiduciaries. It is true that under certain circumstances they might themselves have become taxpayers in respect to the corpus of their trusts, but only in case they had made sales of some of the securities composing the corpus—not, as here, when without making any sales they wound up their trusts and distributed the corpus to remaindermen. To treat the trustee and beneficiary-remainderman, as the Commissioner wishes us to do, as a "sort of dual tax personality" is to disregard the plain language of the statute and to adopt a concept which seems to us to defy analysis. In view of the clear terms of the third clause of Section 113 (a) (5) it can make no difference whether the interest of any remaindermen be vested, vested subject to be divested, or contingent. In either event the basis should be "the fair market value at the time of the distribution to the taxpayer," i. e., to the respondent whose income taxes are being reviewed, and not to the trustee.

In respect to the securities purchased either by the executors or trustees the Commissioner says they do not come within the third clause of Section 113 (a) (5) because they were not  
237 acquired by will. This requires a most technical interpretation of the clause and one that in our opinion is not sound even technically. Any property distributed by a trustee which is part of the corpus of the trust is acquired through and by virtue of the will. Through the will the remaindermen derived all their interests and without it they would have had no standing and would have received nothing. *Lyeth v. Hoey*, 305 U. S. 188, 194-195.

It is further argued that the Senate Report in respect to the enactment of Section 113 (a) (5) in the 1928 Act justified the Commissioner's interpretation of the statute. In dealing with the third clause the report said: "It would also apply in cases where the executor purchases property and distributes it to the beneficiary." There is, however, no reason because of this mention of purchases by the executor for limiting the application of the report to property so purchased. In cases where a trust has been created by will the executor will often act as trustee before the trust is actually set up and sometimes will sell and purchase securities on behalf of the trust. Indeed the statement in the Senate Report would not cover the particular

facts before us except in situations where the executor so acted.

The Commissioner apparently contends that the decision in *Brewster v. Gage*, 280 U. S. 327, fixing the date of death as the time when property should be valued under the provisions of the Revenue Act of 1921, for the purposes of computing gain or loss, affords some guide in interpreting Section 113 (a) (5). The difficulty in maintaining such a contention is that Section 113 (a) (5) is specific, that it fixes a different date for valuing acquisitions of property from that of the Act of 1921, and that the opinion in *Brewster v. Gage* says at page 337: "The deliberate selection of language so differing from that used in the earlier acts indicates that a change of law was intended."

In *United States v. Nostrand*, 94 F. (2d) 510, and *Commissioner v. Libbey*, 100 F. (2d) 458, the Court of Appeals 238 of the First Circuit held that the basis for computing gain or loss to the taxpayer was the market value of the property at the time of distribution by the trustee to the remaindermen, and not the value at the time of distribution by the executor to the trustees. These decisions, rather than that of the Seventh Circuit in *Commissioner v. Maguire* rendered on March 5, 1940, are in accord with our view.

The second question is whether the securities passing to the respondents *Gambrill* and *Knox* were held by them for more than two years and hence whether any gain or loss realized by the sale was taxable not as ordinary income or loss but as a capital gain or loss because the securities were "capital assets" as defined in Section 101 (c) (8) and (B) of the Revenue Act of 1928. The Board held that they were not, and they plainly were not unless the period during which they were held by the trustees can be added to the period between the date of distribution to the taxpayers and the date of sale. There cannot be any such tacking because the property, when held by the respective respondents, did not have "for the purpose of determining gain or loss from a sale \* \* \*, the same basis \* \* \* in his hands as it would have in the hands" of the trustees.

On behalf of the Commissioner it is argued that the decision of the Supreme Court in *McFeeley v. Commissioner*, 296 U. S. 102, requires us to find that the securities had been held from the date of death and that they, therefore, were held for more than two years prior to sale. That decision, however, involved an estate where there was no trust. The court only decided that the general legatee held the securities which were transferred to him by the executor from the date of death. We agree with the Board that the intervening trusts broke the continuity so

that the taxpayer only held the securities from the time they were distributed to him.

239 In the Campbell case certain Woolworth stock was purchased by the taxpayer prior to distribution to her by the trustee of other shares of the same kind. If she did not hold the shares she acquired under the will until they were distributed to her by the trustee, under the "first-in-first-out" rule, her own shares should be treated as sold prior to those which were delivered to her by the trustee. We agree with the Board that her own shares must be regarded as sold first. During the time that the title to the shares remained in the trustee the taxpayer had no control over their disposition and they were not acquired until she obtained them as her own. *Helvering v. San Joaquin Fruit & Investment Co.*, 297 U. S. 496.

The orders of the Board of Tax Appeals are affirmed.

The orders of the Board of Tax Appeals are affirmed.

240 In United States Circuit Court of Appeals, Second Circuit

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

MARJORIE K. CAMPBELL, RESPONDENT

Appeal from the United States Board of Tax Appeals

*Judgment*

(Filed June 29, 1940)

This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said Board in accordance with this decree.

D. E. ROBERTS, *Clerk.*

241 [File endorsement omitted.]

242 [Clerk's certificate to foregoing transcript omitted in printing.]

140 GUY T. HELVERING VS. MARJORIE K. CAMPBELL

243 Supreme Court of the United States

*Order allowing certiorari*

(Filed November 12, 1940)

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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